Supreme Court, U.S.
FILED
99 632 OCT 12 1999
OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

GORDON M. BROWNE and EDITH C. BROWNE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Barnaby W. Zall
7018 Tilden Lane
Rockville, MD 20852
(301) 231-6943

J. E. McNEIL
Counsel of Record
4614 Wisconsin Avenue, NW
Washington, DC 20016
(202) 686-2600

1444

QUESTIONS FOR REVIEW

1. Whether the Internal Revenue Service, which grants waivers of interest and penalties for economic and personal hardships, may refuse to grant such waivers to persons who claim religious hardship.

2. Whether the Internal Revenue Service may impose additional costs upon those who claim religious hardships by delaying collection of taxes beyond the time required for regular enforcement procedures.

TABLE OF CONTENTS

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions included 1

Statement of the Case 3

Introduction 3

Petitioners 4

The Tax Payments 5

The IRS Reactions 6

The District Court Proceedings 8

The Appeal 10

Reasons for Granting the Writ 10

I. The Decision Below Conflicts With Decisions of This Court Regarding Government's Refusal to Consider Religious Hardship in Individualized Hardship Determinations 10

II. The Lower Court's RFRA Analysis Conflicts With Other Circuits' Requirements That The Government Demonstrate Evidence That A Religious Accommodation Could Not Be Made. 14

III. This Is The Proper Case to Review Lower Courts' Confusion Over Individualized Determinations of Religious Hardships 17

Conclusion 18

APPENDIX

TABLE OF CONTENTS

ORDERS AND DECISIONS

1. Browne v. United States, Docket No. 98-6124 (2nd Cir., March 24, 1999). 1a

2. Ruling on Motion for Judgment on the Pleadings, J. Murtha, United States District Court, Browne v. United States, 1:97CV349 (D. Vt., May 13, 1998). 4a

3. Letter dated May 2, 1997 from IRS denying Brownes request for refund 13a

ORDER ON REHEARING

4. Order denying motion for rehearing and suggestion for rehearing *en banc*. July 12, 1999. 15a

CONSTITUTIONAL PROVISIONS, TREATIES STATUTES AND REGULATIONS

5. First Amendment to the U. S. Constitution 16a

6. Internal Revenue Code § 6404(e) 17a

7. Internal Revenue Code § 6651(a)(2) 18a

8. Internal Revenue Code § 6654(e)(3)(A) 20a

9. Religious Freedom Restoration Act 21a

10. Treas. Regs. § 301.6404-0. 26a

11. Treas. Regs. § 301.6651-1 33a

12. Internal Revenue Manual selected parts 40a

OTHER ESSENTIAL MATERIALS

13. Complaint filed October 28, 1997 96a

TABLE OF AUTHORITIES

CASES

Adams v. Commissioner, 110 T.C. 137 (1998) 9

Adams v. Commissioner of Internal Revenue, 170 F.3d 173 (3d Cir. 1999) 16, 17

Bowen v. Roy, 476 U.S. 693 (1986) 12

Cheema v. Thompson, 67 F.3d 883, 885 (9th Cir. 1995) 14, 15

Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 537 (1993) 12, 17

City of Bourne v. Flores, 521 U.S. 507 (1997) 14

Craddick v. Duckworth, 113 F.3d 83, 85 (7th Cir. 1997) 14, 15

Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872, 884 (1990) 7, 10, 12--13

Frazee v. Illinois Dept. of Employment Security, 489 U.S. 829 (1989) 12

Hobbie v. Unemployment Appeals Commission, 480 U.S. 136 (1987) 12

In re Young, 141 F.3d 854 (8th Cir. 1998) 15

Kelly v. Johnson, 425 U.S. 238, 245-46 (1976) 12

Newark, NJ v. FOP Newark Lodge 12, ___U.S.____, *cert. denied* (98-1919 Oct 4, 1999) 12

Packard v. United States, 176 F.3d 25 (2d Cir. 1999) 17

Sherbert v. Verner, 374 U.S. 398 (1963) 12

Small v. Lehman, 98 F.3d 762 (3d Cir. 1996) 15

Thomas v. Review Board, 450 U.S. 707 (1981) 12

United States v. Lee, 455 U.S. 242 (1982) 10--12

CONSTITUTIONAL PROVISIONS

First Amendment to the U.S. Constitution. 4

STATUTES

I.R.C. § 6404 . . . . . 3, 7

I.R.C. § 6651 . . . . . 3, 7, 13, 16

I.R.C. § 6654 . . . . . 3, 7, 17

I.R.C.§ 7422 7

Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb 4, 7, 10, 14--17

REGULATIONS

IRM [120.1] 1.1 08/20/98 3

IRM [120.1] 1.3 08/20/98 3

IRM [120.1] 1.3.1 08/20/98 3

IRM [120.1] 1.3.2.5 8/20/98 11

IRM [120.1] 2.1.3 08/20/98 11

IRM [120.1] 3.4.1 08/20/98 11

IRM [120.1] 6.1.3 08/20/98 . . . . . 3, 11

Treas. Regs. § 301.6404 3

Treas.Regs. § 301.6651 . . . . . 3, 6, 11

COURT RULES

Rule 12(c) of the Federal Rules of Civil Procedure . . . 8

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit is set forth in the Appendix, p.1a and is reported at 176 F.3rd 25 (2nd Cir. 1999). The order of the United States District Court for Vermont is unpublished and set forth in the Appendix ("App."), App. 4a. A timely petition for rehearing was denied on July 12, 1999. App. 15a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254. The United States Court of Appeals for the Second Circuit issued its denial for the Browne's petition for rehearing on July 12, 1999. This Petition was timely filed on October 8, 1999.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

[Reprinted in the Appendix, at 16a]

U.S. Constitution, Amendment 1 App. 16a

STATUTES

Internal Revenue Code § 6404(e) App. 17a
Internal Revenue Code § 6651(a)(2) App. 18a
Internal Revenue Code § 6654(e)(3)(A) App. 20a

Religious Freedom Restoration Act
42 U.S.C. Sec. 2000bb App. 21a

Treas. Regs. 301.6651-1(c)(1) App. 26a
Treas. Regs. § 301.6404-0 App. 33a

Internal Revenue Manual
08/20/98 App. 40a

STATEMENT OF THE CASE

Introduction:

This is an action for refund of penalties and interest levied on income taxes for tax years 1993, 1994 and 1995. There are no factual disputes in this case, as the decision below was entered on a motion for judgment on the pleadings, Appendix ("App.") which was granted on May 13, 1998, App. 4a.

Congress has established a series of penalties and interest payments for those who do not pay their taxes fully and on-time. I.R.C. §§ 6404, 6651, and 6654. Congress, however, also provided exemptions from those penalties and interest charges for hardships. *Id.*.

The Internal Revenue Service administers these exemptions on an individualized basis under its regular policies. Treas. Regs. § 301.6404, Treas.Regs. § 301.6651 Internal Revenue Manual ("IRM") [120.1] 1.1 08/20/98, [120.1] 1.3 08/20/98, [120.1] 1.3.1 08/20/98 [120.1] 6.1.3 08/20/98. These exemptions are available to those who can demonstrate "reasonable cause." *Id.* The exemptions are available to persons with marital, financial or personal problems. *Id.*

The IRS refuses, however, to extend these exemptions to those persons whose hardship is religious in nature. [120.1] 6.1.3 08/20/98 at App. 93a. The IRS reiterated its policy in its response to the request for refund. App. 13a.

This refusal to grant hardship waivers to those whose hardship is religious is the basis for this suit. Petitioners contend that the IRS's refusal to entertain their application

for a hardship waiver is a violation of the Free Exercise Clause of the First Amendment, this Court's decisions, and the Religious Freedom Restoration Act as well as a reasonable interpretation of the Internal Revenue Code, itself, and creates a conflict between the circuits so that persons in some areas are entitled to relief and others in other areas are not.

Petitioners:

Petitioners Gordon and Edith Browne are well-known members of the Religious Society of Friends ("Quakers"). Complaint ("Cpt") 2, *reprinted* in at App. 96a. Until 1988, Gordon Browne was Executive Secretary of an influential international Quaker organization, the Friends World Committee for Consultation, Section of the Americas. Cpt. 3.

Quakers have historically refused to participate in war. Gordon Browne served on the Friends Committee on War Tax Concerns which was established in 1985 to study, and lead Friends' organizations in, "Military Tax" issues. *Id.*

Gordon and Edith Browne began to question whether, contrary to the historical Quaker refusal to participate in war-related activities, they were actually "willing participants" in war-related activities because they **voluntarily** paid that portion of their taxes which funded military and war-related activities. *Id.* The voluntariness of this payment for war-related activities was important to the Brownes. *Id.* The Brownes knew that failure to pay this portion of their taxes voluntarily would result in the Internal Revenue Service collecting their taxes involuntarily. *Id.* They discussed between themselves

whether, knowing that the IRS would collect the taxes involuntarily, the voluntary payment of this portion of their taxes violated their deeply-held religious beliefs. *Id.*

As a result of their religious faith and study, the Brownes came to believe that they could no longer voluntarily pay that portion of their federal income taxes which they determined was dedicated to war or related to participation in war. *Id.*

Although Quakers have no set creed or ordained ministers, they have, in their 300-year history, devised a system to help individuals and Meetings (groups of Quakers in some ways similar to churches) discern the will of God. *Id.*, n. 2. These Committees of Clearness are composed of Friends chosen for their piety and wisdom who meet and pray with individuals who are asking for guidance. *Id.* The Brownes met with a Committee on Clearness who recorded their support of the Browne's action as a "witness as a true leading from God." *Id.*, 3.

The Tax Payments:

Acting under this supported and strong belief, the Brownes filed their 1993, 1994 and 1995 taxes on time and with an accurate return. *Id.*, 4. Each return was accompanied by a letter explaining the Brownes' position, and describing what they were doing. *Id.*, 4, 5, 6, Attachments A and B. The Brownes made no attempt to conceal or sequester assets, and the IRS was well-aware of the Brownes' bank account and other financial information. *Id.*, 5, 6.

In each of those years, the Brownes did not pay a portion of the taxes due to the government. *Id.*, 4, 5, 6.

That portion varied from 25 to 28 percent, and was calculated to include federal war-related expenditures. *Id.*

In order to avoid any personal benefit from the withholding of this voluntary payment, in each of these years, the Brownes paid an equal amount to non-profit organizations (despite knowing that they would have to pay these taxes involuntarily as an additional amount). *Id.*, 4. The Brownes did not deduct these payments to nonprofit organizations from their taxes due. *Id.*

As required by the regulations defining reasonable cause, for purposes of a hardship waiver, the Brownes made sure that they had sufficient assets in their banks accounts to satisfy their tax liability. Treas. Regs. 301.6651-1(c)(1), at App. 36a.

The IRS Reactions:

In each of these years, the IRS contacted the Brownes within three months of their timely tax filing. *Id.*, 4, 5, 6. The Brownes always replied to the IRS within seven days. *Id.*, 5, 6.

The IRS, as expected, eventually levied the full amount of unpaid taxes from the Brownes' bank accounts. *Id.* The IRS, however, took as long as two years to collect the unpaid amounts. *Id.*, 5. The result of the delay was the imposition of additional penalties and interest. *Id.*, 6, 7.

There was no explanation for the delay in collection, *id.*, even though, in oral argument in the court below, the IRS conceded that it could have collected the unpaid taxes in only two months. The resulting delay increased the Brownes' liability by as much as 15% in penalties for each year plus additional interest.

The Brownes were required to request administratively a refund of wrongfully collected penalties and interest. I.R.C.§ 7422(a). The Brownes filed their request with the IRS on March 24, 1997. Cpt. 6.

The Brownes based their refund request on I.R.C. § 6651(a)(2), which provides in relevant part, for a waiver of penalties for failure to pay the full amount of tax where the failure is due to "reasonable cause and not due to willful neglect." The Brownes relied, as well, on I.R.C.§ 6404(e)(1)(A), which provided "the Service may abate the assessment of all or any part of such interest for any period" that is "attributable in whole or in part to any . . . delay by an officer or employee of the Internal Revenue Service." The Brownes also relied on I.R.C. § 6654(e)(3)(A) which provides that no addition to tax shall be imposed where "by reason of casualty, disaster, or **other unusual circumstances** the imposition of such addition to tax would be against **equity and good conscience**." (Emphasis added.) The Brownes complied with IRS regulations requiring that, to obtain this waiver, they file a declaration where the return was filed. Treas. Regs. § 301.6651-1(c)(1).

The Brownes asserted that the imposition of penalties and interest in these circumstances, especially where any delay was solely the fault of the IRS, violated the First Amendment to the U.S. Constitution, federal statutes, and decisions of this Court. Cpt., 7-11, *citing, inter alia, Employment Div., Dept. of Human Resources of Ore. v. Smith* ("*Smith*"), 494 U.S. 872, 884 (1990), and the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb, *et seq.*

The Brownes' refund request was denied on May 2, 1997. App. 13a. The IRS stated in its May 2, 1997, rejection of the Brownes' claim that "our position is that arguments based on religious and moral convictions do not constitute 'reasonable cause' nor require that the IRS distinguish between taxpayers on the basis of religious and moral convictions in the collection process." *Id.*

Although the Service initially refused to forward the request to an appeal, as required by regulations it ultimately determined that no appeal would be heard, and notified the Brownes by certified mail, as required. Cpt. 6, 7.

The District Court Proceedings:

The Brownes filed a complaint for refund of interest and penalties in the United States District Court for the District of Vermont on October 28, 1997. Cpt. 1. The complaint had four counts, citing violations of the Free Exercise Clause and RFRA. *Id.*

The government responded with a motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure. Docket Item ("Doc.") 7. The government conceded, as it must in such a motion, that "the taxpayers' allegations demonstrated that the application of the income tax laws constituted a substantial burden on the free exercise of their religious beliefs." Doc. 8 at 10-15; Brief for the Appellee, 6, n. 4.

In its Motion, the government noted that "reasonable cause" -- a prerequisite for a hardship waiver of penalties -- is shown if the taxpayer can show that he or she would suffer undue hardship if forced to pay the full amount.

Doc. 8, at 6. The government also asserted that since this Court's decisions state that religious objections "afford no basis for resistance to tax, . . . such beliefs necessarily cannot provide grounds to avoid imposition of penalties imposed for noncompliance." Brief for Appellees, 7. Finally, the government asserted that interest and penalties are necessary enforcement mechanisms which provide taxpayers with an incentive to comply, and thus need not be the least restrictive means of furthering its interest. *Id.*, 7-8.

In an brief, unpublished opinion, the District Court granted the government's Motion for Judgment on the Pleadings. Doc. 13. The District Court said that the tax system could not function if denominations were allowed to challenge the tax system. *Id*, 4. The lower court also held, contrary to the facts and irrelevantly to the legal argument, that the Brownes could not "force the IRS to undertake the additional time and expense of using levy procedures to collect the amount [taxpayers] admit is due." *Id.*

The District Court asserted that "mandatory participation in the Federal tax system, irrespective of religious belief, is a compelling governmental interest."*Id.*, 8, *quoting Adams v. Commissioner*, 110 T.C. 137 (1998). Finally, the District Court said that requiring voluntary compliance and imposing penalties and interest was the least restrictive means of furthering the government's compelling interest in mandatory participation in the tax system. *Id.*

The Appeal:

The Brownes timely filed an appeal. Doc. 15. In addition to the arguments made in the District Court, the Brownes argued that the case should not have been decided on the pleadings. Doc.___Appellant's Brief, pg__

The Second Circuit affirmed the District Court's judgment. App. 1a. The Second Circuit offered only three substantive sentences in its rationale:

> --the Brownes are required to comply with the tax laws, citing *Smith* and *United States v. Lee* ("*Lee*"), 455 U.S. 242 (1982), App. 3a;
>
> --the Brownes are not entitled to "force the IRS to levy the taxes due at additional time and expense", again citing *Smith*, *id.*; and,
>
> --the Brownes' "RFRA claim must also fail because voluntary compliance is the least restrictive means by which the IRS furthers the compelling governmental interest in uniform, mandatory participation in the federal income tax system." *Id.*

The Brownes timely filed a Suggestion of Rehearing and a Petition for Rehearing *En Banc*. The request was denied on July 12, 1999. App. 15a.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With Decisions of This Court Regarding Government's Refusal to Consider Religious Hardship in Individualized Hardship Determinations.

The lower court relied on only two cases from this

Court: *Smith* and *Lee*. Yet neither *Smith* nor *Lee* suggest that the IRS may use individualized determinations to accommodate some hardships, but refuse to accommodate religious ones. This Court should grant *certiorari* to instruct the lower courts on how to handle questions involving individualized determinations of religious hardship, as discussed in *Smith*. 494 U.S. at 884 ("individualized governmental assessment of the reasons for the relevant conduct").

Under its rules, the IRS will grant hardship waivers of penalties and interest for a variety of grounds, including destruction of a taxpayer's residence by fire or civil disturbance, serious illness, or unavoidable absence. IRM [120.1] 1.3.2.5 08/20/98. Similarly, a taxpayer who suffers a death in the immediate family will not be required to pay penalties and interest. *Id.* These waivers are granted based on the IRS's assessment of individual circumstances. Treas. Regs. 301.6651-1, IRM [120.1] 1.3.2.5, [120.1] 2.1.3. , and [120.1] 3.4.1.7.

The IRS agent reviewing a claim for hardship waiver is to assess whether the taxpayer has asserted a "reasonable cause" for the failure to pay the full amount. *Id.* Each claim is treated separately, with consideration given to individualized circumstances. *Id.* "Reasonable cause determinations MUST be made on the individual facts and circumstances of each case." IRM [120.1] 2.1.3 at App. 80a.

But the IRS will **not** grant these individualized hardship waivers where the hardship or "reasonable cause"is religious in nature. IRM [120.1] 6.1.3. The IRS specifically stated in its letter to the Brownes that it would

not grant them a hardship waiver for this reason. Letter App. 13a.

In *Smith*, this Court said that a government agency may not exclude religious grounds from a system of "individualized governmental assessment of the reasons for the relevant conduct." 494 U.S. at 884. In *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 537 (1993), this Court noted that "in circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of "religious hardship" without compelling reason.'" *quoting Smith*, 494 U.S. at 884, and *Bowen v. Roy*, 476 U.S. 693, 708 (1986) (opinion of Burger, C.J.).

That is what the IRS is doing here. "Thus, religious practice is being singled out for discriminatory treatment." *Lukumi*, 508 U.S. at 538, *citing*, *Bowen v. Roy*, 476 U.S. at 722, and *United States v. Lee*, 455 U.S. at 264, n. 3 (1982)(Stevens J., concurring in judgment).

Though a religious ground need not be treated any better than any other permitted ground, it cannot be treated any worse. *Sherbert v. Verner*, 374 U.S. 398 (1963); *Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829 (1989); *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987); *Thomas v. Review Board*, 450 U.S. 707 (1981). This Court recently let stand a challenge to the Third Circuit's holding that a police officer may wear his religiously mandated beard despite mandatory grooming requirements., *Newark, NJ v. FOP Newark Lodge 12*, ___U.S. ____*cert. denied* (98-1919 Oct 4, 1999) compare *Kelly v. Johnson*, 425 U.S. 238, 245-46 (1976) (rejecting 14th Amendment challenge to

police grooming regulation).

The lower court's decisions here would eviscerate this rule. By defining the government's compelling interest as "mandatory, uniform participation" in the federal tax system, App. 3a, the lower court simply ignored the individualized waiver system of which the Brownes are seeking to be part. Yet Congress has established, and the IRS is administering, an individualized waiver program for hardships. I.R.C.§§ 6651(a)(2), 6654(e)(3)(A). The sole reason the Brownes are not being permitted to use this individualized waiver system is because their hardship is religious.

Even if, as the lower court suggests, the government has a compelling interest in mandatory participation, Congress has surely decided that the IRS may grant individual waivers from penalties and interest in certain circumstances. *Id.* The question in this case is whether the IRS's refusal to consider religious hardship as "reasonable cause" or hardship sufficient for an individualized waiver is constitutional. The lower court did not evaluate this question as this Court's decisions require.

The lower court's reasoning conflicts with the decisions described immediately above. If left standing, the Second Circuit's decision would confuse and confound other courts' evaluations of similar individualized exemption programs. For example, could the government simply define participation in an unemployment tax system as "mandatory" even if it had individualized hardship waivers? This would contradict *Smith*, 494 U.S. at 884, but would be permitted under the lower courts' rationale here.

The Court should grant *certiorari* to clarify and correct any confusion caused by the lower court's rejection of this Court's precedents governing the individualized exemption system under which the Brownes sought relief.

II. The Lower Court's RFRA Analysis Conflicts With Other Circuits' Requirements That The Government Demonstrate Evidence That A Religious Accommodation Could Not Be Made:

In addition to the conflict with this Court's *Smith, Lee,* and other decisions noted above, the decision below conflicts with decisions of other circuits involving the same type of analysis under the Religious Freedom Restoration Act of 1993. 42 U.S.C. § 2000bb.

Thus, in the Ninth Circuit, RFRA permits a child to take a dangerous knife to school because of religious considerations, *Cheema v. Thompson*, 67 F.3d 883, 885 (9th Cir. 1995)(RFRA requires serious consideration and a demonstration of least restrictive means). Similarly, in the Seventh Circuit, the failure to show "the least restrictive means" doomed a prison dress uniformity rule challenged on religious grounds. *Craddick v. Duckworth,* 113 F.3d 83, 85 (7th Cir. 1997). Yet, here, the Brownes' equally strong claim to participation in an individualized exemption process was denied on the pleadings in the Second Circuit. This conflict will confuse the lower courts about the evaluation required under RFRA.

Although this Court reviewed RFRA as to state laws in *City of Bourne v. Flores*, 521 U.S. 507 (1997), the application of RFRA to individualized federal exemption procedures (like the one challenged here) is still open.

RFRA generally prohibits governmental action which "burdens" an individual's "exercise of religion." 42 U.S.C. § 2000bb-1(a). In this case, both sides agree that the IRS's actions are a substantial burden on the Browne's religious exercise. *See, e.g.*, Brief for Appellee at 6, n. 4.

RFRA then provides an "exception" to its general prohibition if the government can "demonstrate" that the challenged practice is the "least restrictive means" of accomplishing a "compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

RFRA defines the term "demonstrate" for this purpose as meaning "meeting the burden of going forward with the evidence and of persuasion." 42 U.S.C. § 2000bb-2(3). Government may not, therefore, simply assert an unproven interest rather than demonstrating evidence of "least restrictive means." A quotation from a Supreme Court Decisions is not a "demonstration" "by eveidnce".

Evidence of "least restrictive means" generally requires a showing of inability to accommodate the particular religious practice. This type of showing is required in several circuits. *See, e.g., In re Young*, 141 F.3d 854 (8th Cir. 1998)(religious contributions exempt from bankruptcy preference treatment); *Craddick v. Duckworth*, 113 F.3d 83, 85 (7th Cir. 1997)(requiring demonstration that agency could not accommodate religious practice); *Small v. Lehman*, 98 F.3d 762 (3d Cir. 1996)(officials' assertion of inability to accommodate insufficient to block RFRA challenge); *Cheema v. Thompson*, 67 F.3d 883, 885 (9th Cir. 1995)(requiring proof of no less restrictive alternative to sustain preliminary injunction).

Yet the lower court here did not even undertake any

such analysis. The Second Circuit's analysis – in its entirety – was simply:

> The Brownes' RFRA claim must also fail because voluntary compliance is the least restrictive means by which the IRS furthers the compelling governmental interest in uniform, mandatory participation in the federal income tax system. *See, Adams v. Commissioner of Internal Revenue*, 170 F.3d 173, 176 (3d Cir. 1999)(affirming the imposition of penalties and holding that the government's failure to accommodate her religious beliefs by ensuring her tax payments did not fund the military did not violate RFRA).

App. 3a.

Leaving aside the fact that a goal of "uniform, mandatory participation in the federal income tax system" is undermined by statutory and regulatory loopholes by the thousands in the Internal Revenue Code, this statement simply does not meet the statutory test for a demonstration under RFRA. 42 U.S.C. § 2000bb-2(3). Nor does it show the deference shown by the other circuits cited above.

This statement is not even logical – especially when the system is certainly not voluntary. And the part that is challenged here--the penalty and interest, not the tax itself-- the relies on an individualized determination. I.R.C. § 6651. There is no voluntariness in the Brownes' consideration; they are coerced – one way or the other – no matter what they do. They can obey their God or their government. The question here is whether the IRS can apply discretionary penalties for individuals who choose

to follow God.

This is exactly the dilemma which RFRA was intended to address. Other courts have undertaken a reasonable analysis of this dilemma, and worked through equally difficult solutions. Yet the court below did not.

Similarly, *Adams*, relied on by the lower court, involved a broader challenge to the payment of taxes. The court in *Adams* confused the procedure required by *Smith* and *Lukumi*, where the government provides an individualized assessment and evaluation procedure, with the substantive requirements of "reasonable cause" under I.R.C.§ 6654(a). 170 F.3d at 181 n. 10.

Such a cavalier approach to RFRA analysis conflicts with the decisions of other Circuits. Thus, since both the Third Circuit in *Adams* and the Second Circuit here failed to use the RFRA analysis used in the Ninth and Seventh Circuits, there is a geographic conflict in legal analysis which this Court should resolve.

This Court should indicate the proper degree of accommodation and the proper analysis required in such a case. The Court should issue a writ to insure that lower courts understand their responsibilities under RFRA to require an actual demonstration of least restrictive means to accommodate religious beliefs.

III. This Is The Proper Case to Review Lower Courts' Confusion Over Individualized Determinations of Religious Hardships:

This case presents the most narrow opportunity to resolve the conflicts identified above. Other cases involve more general challenges to governmental powers; this case

only covers the IRS's non-neutral handling of religious hardship claims to an already established system of waivers.

The Court should take this opportunity to resolve these legal questions and instruct lower courts.

CONCLUSION

For the reasons stated, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

J. E. McNEIL
Counsel of Record
4614 Wisconsin Avenue, NW
Washington, DC 20016
(202) 686-2600

Barnaby W. Zall
7018 Tilden Lane
Rockville, MD 20852
(301) 231-6943

October 11, 1999

(Any footnotes trail end of each document)

Docket No. 98-6124

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Gordon M. Browne and Edith C. Browne,
Plaintiffs-Appellants,

v.

United States of America dba Internal Revenue Service,
Defendant-Appellee.

February 26, 1999, Argued
March 24, 1999, Decided

COUNSEL: J. E. MCNEIL, Esq., Jordan, McNeil & Ricks, P.C., Washington, D.C., for Plaintiffs-Appellants.

MICHELLE B. O'CONNOR, Attorney, Tax Division, Department of Justice, Washington, D.C., for Defendant-Appellee.

JUDGES: Before: WALKER, POOLER, and HEANEY, * Circuit Judges.

OPINIONBY: GERALD W. HEANEY

OPINION:

Gordon and Edith Browne appeal from a final judgment on the pleadings entered on May 18, 1998, in the United States District Court for the District of Vermont, J. Garvan Murtha, Chief Judge, dismissing a refund action for penalties and

interest based on the hardship waiver provisions provided in Internal Revenue Code (IRC) § 6651(a)(2), Treas. Reg. § 301.6651-1(c)(1), IRS Policy Statement P-2-7 and IRM 5172.11 and .12, IRC § 6404, and IRC § 6654(e)(3)(A) in conjunction with the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. ("RFRA") and the First Amendment of the Constitution and declining to order the IRS to use levy procedures without interest or penalties to collect the portion of their taxes which they withhold for religious reasons. Accordingly, the judgment of the district court is affirmed.

The Brownes are members of the Religious Society of Friends, more commonly referred to as the Quakers. Based on their deeply held religious beliefs in opposition to any participation in war, in 1993, 1994, and 1995 the Brownes withheld that portion of their tax liability which they computed would be allocated to the Department of Defense. The IRS subsequently levied the Brownes for the taxes owing and assessed penalties and interest. Relying on RFRA and the First Amendment's guarantee of freedom of religion, the Brownes contend that the IRS must allow them to withhold a portion of their taxes and then collect it by levy without charging interest or a penalty.

The Brownes' First Amendment claim fails because they are required to comply with the tax laws despite religious-based disagreement with the allocation of certain funds. See Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 878-79, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990) ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law . . . ."); see also United States v. Lee, 455 U.S. 252, 260, 71 L. Ed. 2d 127, 102 S. Ct. 1051 (1982) ("Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the

tax."). Furthermore, they are not entitled to force the IRS to levy the taxes due at additional time and expense. See Smith, 494 U.S. at 878-79. The Brownes' RFRA claim must also fail because voluntary compliance is the least restrictive means by which the IRS furthers the compelling governmental interest in uniform, mandatory participation in the federal income tax system. See Adams v. Comm'r of Internal Revenue, 170 F.3d 173, 176 (3d Cir. 1999) (affirming the imposition of penalties and holding that the government's failure to accommodate her religious beliefs by ensuring her tax payments did not fund the military did not violate RFRA).

CIVIL NO. 1:97CV349

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

GORDON M. and EDITH C. BROWNE

v.

UNITED STATES OF AMERICA

May 13, 1998, Decided
May 14, 1998, Filed

COUNSEL: For GORDON M. BROWNE, EDITH C. BROWNE, plaintiffs: James Torrisi, Esq., Derby Line, VT.

For GORDON M. BROWNE, EDITH C. BROWNE, plaintiffs: J. E. McNeil, Esq., Jordan, Mcneil & Ricks, P.C., Washington, DC.

For UNITED STATES OF AMERICA dba Internal Revenue Service, defendant: Carol L. Shea, AUSA, Office of the United States Attorney, District of Vermont, Burlington, VT.

For UNITED STATES OF AMERICA dba Internal Revenue Service, defendant: George P. Eliopoulos, Esq., Karen A. Smith, Esq., U.S. Department of Justice, Trial Attorney, Washington, DC.

JUDGES: J. Garvan Murtha, Chief Judge.

OPINIONBY: J. Garvan Murtha

OPINION: RULING ON MOTION FOR JUDGMENT ON THE PLEADINGS

(paper 7)

Background

In relevant part, Fed. R. Civ. P. 12(c) provides: "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." "In evaluating a Rule 12(c) motion, the court must view the pleadings in the light most favorable to, and draw all reasonable inferences in favor of, the nonmoving party." Madonna v. United States, 878 F.2d 62, 65 (2d Cir. 1989). The Court also must accept all well-pleaded material factual allegations as admitted and may not dismiss the complaint "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)).

Applying this standard, the Court finds the following. Plaintiffs Gordon and Edith Browne are members of the Religious Society of Friends, more commonly referred to as the "Quakers." Based upon their deeply-held religious beliefs, many Quakers historically have refused to participate in any war-related activities.

In this case, the plaintiffs object to voluntarily supporting Department of Defense activities with their taxes. The plaintiffs filed federal income tax returns for 1993, 1994 and 1995. In these returns, they indicated the total amount of tax they owed; however, they only remitted approximately 72% of the sum due and owing. They did not pay the remaining 28%, which they computed as representing the portion of

their taxes which the Government allocated to the Department of Defense.

The Brownes describe their complaint as follows:

The Brownes are not arguing either that the Government cannot collect taxes or that the Government should not levy for taxes owing. The Brownes complaint [sic] solely on the premise that while collecting those taxes the Government may not, in the name of neutral application of law, inflict the additional pain of penalties and interest where the Government already has it within its power to meet [sic] its own compelling interest to collect taxes with its already established system of levy.

Simply put: the Service abused its discretion in not applying its established exception to the assessment of penalties and interest to these individuals who acted based on their deeply held religious beliefs.

Opposition to Motion to Judgment on the Pleadings (paper 11) at 1-2.

Relying on the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. (hereinafter "RFRA"), the First Amendment's guarantee of freedom of religion, and a variety of provisions from the Internal Revenue Code, the plaintiffs seek an abatement of penalties and interest which the IRS imposed as a result of their partial payments for tax years 1993, 1994 and 1995. They also seek an order requiring the IRS to use levy procedures to collect the portion of their taxes which they withheld as earmarked for the Department of Defense. By requiring the IRS to levy these funds, the plaintiffs believe they avoid voluntary support of war-related activities.

Discussion

The plaintiffs essentially seek to impose an obligation upon the Government to accommodate their objection to a particular use of their tax dollars. However, courts consistently have upheld the constitutionality of the federal tax laws when considering objections similar to those raised by the plaintiffs. See, e.g., Tinsley v. Commission of IRS, 958 F. Supp. 277, 280 (N.D. Tex. 1997).

For example, in United States v. Lee, 455 U.S. 252, 71 L. Ed. 2d 127, 102 S. Ct. 1051 (1982), an Amish employer sought an exemption from the collection and payment of Social Security taxes on the ground that the Amish faith prohibited his participation in governmental support programs. In rejecting the taxpayer's argument, the Court explained:

It would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs. The obligation to pay the social security tax initially is not fundamentally different from the obligation to pay income taxes; the difference--in theory at least--is that the social security tax revenues are segregated for use only in furtherance of the statutory program. There is no principled way, however, for purposes of this case, to distinguish between general taxes and those imposed under the Social Security Act. If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief. . . . Because the broad public interest in maintaining a sound tax system is of such a high

order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax.

Id. at 259-60 (citations omitted).

Accordingly, the plaintiffs' religion-based disagreement with the uses to which certain of their tax funds are put does not relieve them of the obligation to comply with this nation's tax laws. See Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 879, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990). Moreover, it does not entitle them to reject voluntary compliance with the tax laws and to force the IRS to undertake the additional time and expense of using levy procedures to collect the amount the plaintiffs admit is due. See id. at 884 ("To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'--permitting him, by virtue of his beliefs, 'to become a law unto himself,' . . . contradicts both constitutional tradition and common sense.")(citation and footnote omitted).

The plaintiffs' reliance on Bowen v. Roy, 476 U.S. 693, 90 L. Ed. 2d 735, 106 S. Ct. 2147 (1986) is misplaced. In Bowen v. Roy, the Supreme Court determined the Free Exercise Clause of the First Amendment does not compel the Government to accommodate an applicant's religiously-based objection to the statutory requirement that he or she provide a Social Security number to obtain certain welfare benefits. In so finding, the Court noted: "Appellees may not use the Free Exercise Clause to demand Government benefits, but only on their own terms, particularly where that insistence works a demonstrable disadvantage to the Government in the administration of the programs." 476 U.S. at 711-12. Similarly, the instant plaintiffs' invocation of religious hardship does not entitle them to ignore their obligation to

voluntarily comply with the country's tax laws, nor does it require the Government to undertake a more onerous levy procedure to collect their taxes.

The plaintiffs also allege that RFRA, 42 U.S.C. §§ 2000bb, et seq., entitles them to withhold a portion of their taxes without interest or penalty.

In Employment Div. v. Smith, 494 U.S. at 883-84, the Court departed somewhat from its prior First Amendment jurisprudence and found that neutral, generally applicable laws may be applied to religious practices, even when not supported by a compelling governmental interest. To restore the "compelling interest" test in matters involving alleged substantial burdens on the free exercise of religion, Congress passed RFRA.
In relevant part, RFRA section 2000bb-1 provides:

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

Thus, RFRA purports to reestablish a "compelling interest" test by prohibiting a government from imposing a substantial burden on the free exercise of religion, unless it demonstrates that the application of the burden is the least restrictive means of achieving a compelling governmental interest.

As an initial observation, the Court questions whether the application of RFRA urged by plaintiffs is constitutional. Recently, in City of Boerne v. Flores, 521 U.S. 507, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997), the Supreme Court held RFRA unconstitutional as applied to state law because, in passing that law, Congress had exceeded its powers under § 5 of the Fourteenth Amendment. Characterizing the statute as a Congressional attempt to substantively change constitutional protections as interpreted by the judiciary, the Supreme Court noted that RFRA's "sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." 117 S. Ct. at 2170.

Furthermore, several courts have concluded RFRA is unconstitutional as applied to certain federal laws. Compare Young v. Crystal Evangelical Free Church, 141 F.3d 854, 1998 U.S. App. LEXIS 7348, 1998 WL 166642 (8th Cir. April 13, 1998)(concluding that RFRA is constitutional as applied to federal law) with In re Gates Community Chapel of Rochester, Inc., 212 B.R. 220, 225-26 (Bankr. W.D.N.Y. 1997)(construing Flores as mooting debtor's argument that payment of post-confirmation U.S. trustee fees violates RFRA) and Flores v. City of Boerne, 877 F. Supp. 355, 356 (W.D. Tex. 1995), aff'd, 119 F.3d 341 (5th Cir. 1997)(RFRA unconstitutional in that it seeks to overturn the Supreme Court's interpretation of the Constitution). Through RFRA, Congress has attempted "to impose upon the judiciary, a

standard of review for interpreting constitutional rights which it believes is a better standard than that crafted by the Court itself." Young, 141 F.3d 854, 1998 U.S. App. LEXIS 7348, 1998 WL 166642 at *9 (Bogue, Sr. District Judge, dissenting). Such an attempt is barred by the Constitution itself, which establishes the judiciary as the governmental body which "interprets the Constitution in a case or controversy." Flores, 117 S. Ct. at 2166.

Nevertheless, even assuming the constitutionality of RFRA and accepting as true the plaintiffs' allegation that voluntary compliance substantially burdens their practice of religion, the plaintiffs' complaint fails as a matter of law. Here, voluntary compliance with federal income tax laws is the least restrictive means of furthering a compelling governmental interest. See 42 U.S.C. § 2000bb(b).

"The Supreme Court has established that uniform, mandatory participation in the Federal income tax system, irrespective of religious belief, is a compelling governmental interest." Adams v. Commissioner IRS, 110 T.C. No. 13 (March 3, 1998)(citations omitted). It is beyond peradventure that the Government's interests in areas such as national defense, public safety and the funding of public health and welfare plans are sufficiently compelling to require general compliance with income tax laws.

Undoubtedly, many Americans disagree with some discrete potential use of their tax monies. Allowing individuals like the plaintiffs to withhold a portion of their due taxes would encourage chaos in that every individual with an objection to a particular governmental expenditure would be able to unilaterally impose additional, time-consuming administrative burdens on the IRS. Furthermore, acceptance of the plaintiffs' arguments would encourage more governmental involvement in religious matters in that the

IRS would be required to assess the genuineness of each tax protester's religious beliefs. See Lee, 455 U.S. at 252 n.2. Finally, it is difficult to imagine a means of compliance with the tax laws which is less restrictive than the voluntary compliance to which the plaintiffs object.

Accordingly, the plaintiffs' complaint is insufficient as a matter of law. Having found the plaintiffs had no lawful basis for their non-compliance, the Court necessarily finds they are not entitled to the refund of interest and penalties otherwise properly assessed.

The Motion for Judgment on the Pleadings (paper 7) is GRANTED. The Clerk is directed to enter judgment in favor of the Government.

SO ORDERED.

Dated at Brattleboro, Vermont, this 13th day of May, 1998.

J. Garvan Murtha

Chief Judge

District Director
INTERNAL REVENUE SERVICE
Department of the Treasury
Date: May 2, 1997
Social Security or Employer Number
Kind of Tax: Income
Tax Period Ended: 12/31/ 93/94/95
Amount Claimed: $1.00+
Date Claim Rec'd: March 24, 1997
Contact: Thomas R. Rapisarda
Telephone: (617) 565-4305

Gordon M. & Edith C. Browne
c/o J.E. McNeil & Ricks, P.C.
4614 Wisconsin Ave., NW, Second Floor
Washington, DC 20016

CERTIFIED MAIL No: Z 126 315 716

We are sorry, but we cannot allow your claim for an adjustment to your tax, for the reasons stated below. This letter is your legal notice that your claim is fully disallowed.

If you wish to bring suit or proceedings for the recovery of any tax, penalties or other moneys for which this disallowance notice is issued, you may do so by filing such a suit with the United States District Court having jurisdiction, or the United States Claims Court. The law permits you to do this within 2 years from the mailing date of this letter. However, if you signed a waiver of the notice of disallowance (Form 2297), the period for bringing suit began to run on the date the waiver was filed.

If you have any questions, please contact the person whose name and telephone number are shown above.

Sincerely yours,

Stephen L. Daige
District Director
New England District

Attachment to letter 906:

This is the certified notice of claim disallowance you requested by phone and facsimile on May 1, 1997, regarding the additions to Federal income tax assessed in the accounts of Gordon & Edith Browne, of Barnet, Vermont.

The dates cited in our letter 2289 were intended to positively identify the correspondence we had received from you. Your correspondence was devoid of dates, with the exception of the signature dates of the forms 843, May 21, 1996. Please notify me immediately if we are not talking about the same claim. I phoned your office March 24, 1997, was informed that you were out of the country, and your associate, Thelma, was able to advise me that you had mailed the correspondence I had received on January 27, 1997, addressed to Rai Shepardson of the IRS, at Montpelier, Vermont.

Regarding the issues of your May 1, 1996 facsimile:

Our letter 2289 and attachment was intended to explain that the IRS allows or disallows interest abatement claims on the basis of "errors or delays in the performance of ministerial acts" and that exceptions to penalty assessments under Section 6651 of the Code are evaluated on the basis "reasonable cause." We read your claims and statements to say "This is a RFRA case." Your elaborations attempted to establish that the religious and moral convictions of "Military Tax Resisters" constitute "reasonable cause" for purposes of

Section 6651. Further, that special collections provisions should be established for such persons, which deny them notice and process protections of the normal collections processes, so that our failure to seize funds immediately upon assessment would constitute a Section 6404(e) error or delay.

You are correct to state that the Congress had provided IRS the authority to make determinations regarding "reasonable cause" and the discretion to abate interest assessments, but those determinations and exercises of discretion are limited to the definitions provided by Congress, evaluated in light of Congressional intent. Our position is that arguments based on religious and moral. convictions do not constitute "reasonable cause" nor require that IRS distinguish between taxpayers on the basis of religious and moral convictions in the collection process. Since the determinations you have requested are beyond the authority provided us by Congress, we have no authority to expand the scope of the rules and regulations to encompass failures to pay tax based on religious and moral convictions.

We have denied your appeal of this determination on the basis of Regulation 601.106(b), which states - the appeals procedures do not extend to cases involving solely the failure or refusal to comply with the tax laws because of moral, religious, political, constitutional, conscientious or similar grounds." If you have arguments beyond those of the moral and religious convictions of the Browne*s, we have not found them in your correspondences.

Again, if you conclude that our determinations regarding penalty abatements, and refusal to exercise discretion regarding interest assessments, constitute a violation of your RFRA rights, we would encourage you to file suit in accordance with that statute.

Docket No. 98-6124

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Gordon M. Browne and Edith C. Browne,
Plaintiffs-Appellants,

v.

United States of America dba Internal Revenue Service,
Defendant-Appellee.

Filed 7/12/99

A Petition for panel rehearing and a petition for rehearing en banc having been filed herein by Appellants Gordon M. & Edith C. Browne

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the pet ition for rehearing en banc has been transmitted to the judges for the Court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
Karen Greve Milton
Acting Clerk

U.S. Constitution, Amendment 1 (in relevant part)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . .

STATUTES

Internal Revenue Code § 6404(e)

ABATEMENT OF INTEREST ATTRIBUTABLE TO UNREASONABLE ERRORS AND DELAYS BY INTERNAL REVENUE SERVICE

(1) IN GENERAL

In the case of any assessment of interest on--

(A) any deficiency attributable in whole or in part to any unreasonable error or delay by an officer or employee of the Internal Revenue Service (acting in his official capacity) in performing a ministerial or managerial act, or

(B) any payment of any tax described in section 6212(a) to the extent that any unreasonable error or delay in such payment is attributable to such an officer or employee being erroneous or dilatory in performing a ministerial or managerial act, the Secretary may abate the assessment of all or any part of such interest for any period. For purposes of the preceding sentence, an error or delay shall be taken into account only if no significant aspect of such error or delay can be attributed to the taxpayer involved, and after the Internal Revenue Service has contacted the taxpayer in writing with respect to such deficiency or payment.

Internal Revenue Code § 6651(a)(2)

(a)Addition to the tax

In case of failure -

(1) to file any return required under authority of subchapter A of chapter 61 (other than Part III thereof . . . on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate;

(2) to pay the amount shown on tax on any return specified in paragraph (1) on or before the date prescribed for payment of such tax (determined with regard to any extension of time for payment), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount shown as tax on such return 0.5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 0.5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate; or

(3) to pay any amount in respect of any tax required to be shown on a return specified in paragraph (1) which is not so shown (including an assessment made pursuant to section 6213(b)) within 10 days of the date of the notice and demand therefor, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount of tax stated in such notice and demand 0.5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 0.5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate. In the case of a failure to file a return of tax imposed by chapter 1 within 60 days of the date prescribed for filing of such return (determined with regard to any extensions of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, the addition to tax under paragraph (1) shall not be less than the lesser of $100 or 100 percent of the amount required to be shown as tax on such return.

Internal Revenue Code § 6654(e)(3)(A)

(3)Waiver in certain cases

(A)In general

No addition to tax shall be imposed under subsection (a) with respect to any underpayment to the extent the Secretary determines that by reason of casualty, disaster, or other unusual circumstances the imposition of such addition to tax would be against equity and good conscience.

42 U. S. Code Chapter 20000bb

CHAPTER 21B - RELIGIOUS FREEDOM RESTORATION ACT

§ 2000bb. Congressional findings and declaration of purposes.
(a) Findings.
(b) Purposes.
§ 2000bb-1. Free exercise of religion protected.
(a) In general.
(b) Exception.
(c) Judicial relief.
§ 2000bb-2. Definitions.
§ 2000bb-3. Applicability.
(a) In general.
(b) Rule of construction.
(c) Religious belief unaffected.
§ 2000bb-4. Establishment clause unaffected.

Sec. 2000bb. Congressional findings and declaration of purposes

(a) Findings
The Congress finds that -
(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended

to interfere with religious exercise;
(3) governments should not substantially burden religious exercise without compelling justification;
(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes
The purposes of this chapter are -
(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

Sec. 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person -

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

Sec. 2000bb-2. Definitions

As used in this chapter -

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;

(2) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means the exercise of religion under the First Amendment to the Constitution.

Sec. 2000bb-3. Applicability

(a) In general

This chapter applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

Sec. 2000bb-4. Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter.

As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

Treas. Regs. SECTION 301.6404-0.

TABLE OF CONTENTS.

This section lists the paragraphs contained in Sections 301.6404-1--301.6404-3.

Section 301.6404-1 ABATEMENTS.

Section 301.6404-2T DEFINITION OF MINISTERIAL ACT (temporary).

(a) In general.

(b) Ministerial act.
(1) Definition.
(2) Examples.

(c) Effective date.

Section 301.6404-3 ABATEMENT OF PENALTY OR ADDITION TO TAX ATTRIBUTABLE TO ERRONEOUS WRITTEN ADVICE OF THE INTERNAL REVENUE SERVICE.

(a) General rule.

(b) Requirements.
(1) In general.
(2) Advice was reasonably relied upon.
(i) In general.

(ii) Advice relating to a tax return.
(iii) Amended returns.
(iv) Advice not related to a tax return.
(v) Period of reliance.
(3) Advice was in response to written request.
(4) Taxpayer's information must be adequate and accurate.

(c) Definitions.
(1) Advice.
(2) Penalty and addition to tax.

(d) Procedures for abatement.

(e) Period for requesting abatement.

(f) Examples.

(g) Effective date.

SECTION 301.6404-1. ABATEMENTS.

(a) The district director or the director of the regional service center may abate any assessment, or unpaid portion thereof, if the assessment is in excess of the correct tax liability, if the assessment is made subsequent to the expiration of the period of limitations applicable thereto, or if the assessment has been erroneously or illegally made.

(b) No claim for abatement may be filed with respect to

income, estate, or gift tax.

(c) Except in case of income, estate, or gift tax, if more than the correct amount of tax, interest, additional amount, addition to the tax, or assessable penalty is assessed but not paid to the district director, the person against whom the assessment is made may file a claim for abatement of such overassessment. Each claim for abatement under this section shall be made on Form 843. In the case of a claim filed prior to April 15, 1968, the claim shall be filed in the office of the internal revenue officer by whom the tax was assessed or with the assistant regional Commissioner (alcohol, tobacco, and firearms) where the regulations respecting the particular tax to which the claim relates specifically require the claim to be filed with that officer. Except as provided in paragraph (b) of Section 301.6091-1 (relating to hand-carried documents), in the case of a claim filed after April 14, 1968, the claim shall be filed (1) with the Director of International Operations if the tax was assessed by him, or (2) with the assistant regional Commissioner (alcohol, tobacco, and firearms) where the regulations respecting the particular tax to which the claim relates specifically require the claim to be filed with that officer; otherwise, the claim shall be filed with the service center serving the internal revenue district in which the tax was assessed. Form 843 shall be made in accordance with the instructions relating to such form.

(d) The Commissioner may issue uniform instructions to

district directors authorizing them, to the extent permitted in such instructions, to abate amounts the collection of which is not warranted because of the administration and collection costs.

SECTION 301.6404-2T. DEFINITION OF MINISTERIAL ACT (temporary).

(a) IN GENERAL. Section 6404(e)(1) provides that the Commissioner may (in his or her discretion) abate the assessment of all or any part of interest on--

(1) Any deficiency (as defined in section 6211(a), relating to income, estate, gift, generation-skipping, and certain excise taxes) attributable in whole or in part to any error or delay by an officer or employee of the Internal Revenue Service (acting in an official capacity) in performing a ministerial act, or

(2) Any payment of any tax described in section 6212(a) (relating to income, estate, gift, generation-skipping, and certain excise taxes) to the extent that any delay in such payment is attributable to such an officer or employee being dilatory in performing a ministerial act. An error or delay in performing a ministerial act shall be taken into account only if no significant aspect of such error or delay can be attributed to the taxpayer involved or to a person related to the taxpayer within the meaning of section 267(b) or section 707(b)(1). Moreover, an error or delay in performing a ministerial act shall be taken into account only if it occurs after the

Service has contacted the taxpayer in writing with respect to the deficiency or payment.

(b) MINISTERIAL ACT--

(1) DEFINITION. The term "ministerial act" means a procedural or mechanical act that does not involve the exercise of judgment or discretion, and that occurs during the processing of a taxpayer's case after all prerequisites to the act, such as conferences and review by supervisors, have taken place. A decision concerning the proper application of federal tax law (or other federal or state law) is not a ministerial act.

(2) EXAMPLES. The definition of ministerial act may be illustrated by the following examples.

EXAMPLE 1. A taxpayer moves from one state to another before the Internal Revenue Service selects the taxpayer's income tax return for examination. A letter explaining that the return has been selected for examination is sent to the taxpayer's old address and then forwarded to the new address. The taxpayer timely responds, asking that the audit be transferred to the Service's district office that is nearest the new address. The group manager approves the request. After the request for transfer has been approved, the transfer of the case is a ministerial act. The Commissioner may (in his or her discretion) abate interest attributable to a delay in transferring the case.

EXAMPLE 2. An examination of a taxpayer's income tax return reveals a deficiency with respect to which a notice of deficiency will be issued. After the taxpayer and the Internal Revenue Service have identified all agreed and unagreed issues, the notice has been prepared and reviewed (including review by District Counsel, if necessary) and any other relevant prerequisites have been completed, the issuance of the notice of deficiency is a ministerial act. The Commissioner may (in his or her discretion) abate interest attributable to a delay in issuing the notice.

EXAMPLE 3. A taxpayer invested in a tax shelter and reported a loss from the tax shelter on the taxpayer's income tax return. Internal Revenue Service personnel conducted an extensive examination of the tax shelter, and the processing of the taxpayer's case was delayed during such examination. Because the period of limitations on assessment was about to expire, the taxpayer executed a consent to extend the period of limitations. The time required to process the taxpayer's case was not a result of a delay in performing a ministerial act; consequently, interest attributable to this period cannot be abated under paragraph (a) of this section.

EXAMPLE 4. A revenue agent is sent to a training course, and the agent's supervisor decides not to reassign the agent's cases. During the training course, no work is done on the cases assigned to the agent. Neither the decision to send the agent to the training course nor

the decision not to reassign the agent's cases is, under the circumstances, a ministerial act. Thus, interest attributable to the delay cannot be abated.

EXAMPLE 5. A taxpayer who claimed a loss from a tax shelter on the taxpayer's income tax return is notified that the Internal Revenue Service intends to examine the return. However, because of other work priorities and resource limitations, a decision is made not to commence the examination for an extended period thereafter. The decision not to commence the examination involves the exercise of judgment and discretion and is not a ministerial act; consequently, interest attributable to the period of delay cannot be abated.

(c) EFFECTIVE DATE. The provisions of this section apply to interest accruing with respect to deficiencies or payments of tax described in section 6212(a) for taxable years beginning after December 31, 1978.

If a refund or credit of interest attributable to the application of paragraph (a) of this section to a tax liability arising with respect to any such taxable year is prevented at any time on or before October 22, 1987, by the operation of any law or rule of law (including res judicata), refund or credit of such interest (to the extent attributable to the application of paragraph (a) of this section) may, nevertheless, be made or allowed if a claim for such interest is filed on or before October 22, 1987.

SECTION 301.6651-1.
FAILURE TO FILE TAX RETURN OR TO PAY TAX.
(a) ADDITION TO THE TAX--

(1) FAILURE TO FILE TAX RETURN. In case of failure to file a return required under authority of--

(i) Subchapter A, chapter 61 of the Code, relating to returns and records (other than sections 6015 and 6016, relating to declarations of estimated tax, and part III thereof, relating to information returns);

(ii) Subchapter A, chapter 51 of the Code, relating to distilled spirits, wines, and beer;

(iii) Subchapter A, chapter 52 of the Code, relating to cigars, cigarettes, and cigarette papers and tubes; or

(iv) Subchapter A, chapter 53 of the Code, relating to machine guns, destructive devices, and certain other firearms; and

The regulations thereunder, on or before the date prescribed for filing (determined with regard to any extension of time for such filing), there shall be added to the tax required to be shown on the return the amount specified below unless the failure to file the return within the prescribed time is shown to the satisfaction of the district director or the director of the service center to be due to reasonable cause and not to willful neglect. The amount to be added to the tax is 5 percent thereof if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which the failure continues, but not to exceed 2 percent in the aggregate. The amount of any addition under this subparagraph shall be reduced

by the amount of the addition under subparagraph (2) of this paragraph for any month to which an addition to tax applies under both subparagraphs (1) and (2) of this paragraph (a).

(2) FAILURE TO PAY TAX SHOWN ON RETURN. In case of failure to pay the amount shown as tax on any return (required to be filed after December 31, 1969, without regard to any extension of time for filing thereof) specified in subparagraph (1) of this paragraph (a), on or before the date prescribed for payment of such tax (determined with regard to any extension of time for payment), there shall be added to the tax shown on the return the amount specified below unless the failure to pay the tax within the prescribed time is shown to the satisfaction of the district director, or, as provided in paragraph (a) of this section, the Assistant Regional Commissioner (Alcohol, Tobacco and Firearms), the director of the service center, to be due to reasonable cause and not to willful neglect. The amount to be added to the tax is 0.5 percent of the amount of tax shown on the return if the failure is for not more than 1 month, with an additional 0.5 percent for each additional month or fraction thereof during which the failure continues, but not to exceed 25 percent in the aggregate.

(3) FAILURE TO PAY TAX NOT SHOWN ON RETURN. In the case of failure to pay any amount of any tax required to be shown on a return specified in paragraph (a)(1) of this section that is not so shown (including an assessment made pursuant to section 6213(b)) within 21 calendar days from the date of the

notice and demand (10 business days if the amount assessed and shown on the notice and demand equals or exceeds $100,000) with respect to any notice and demand made after December 31, 1996, there will be added to the amount stated in the notice and demand the amount specified below unless the failure to pay the tax within the prescribed time is shown to the satisfaction of the district director or the director of the service center to be due to reasonable cause and not to willful neglect. The amount added to the tax is 0.5 percent of the amount stated in the notice and demand if the failure is for not more than 1 month, with an additional 0.5 percent for each additional month or fraction thereof during which the failure continues, but not to exceed 25 percent in the aggregate. For purposes of this paragraph (a)(3), see Sec. 301.6601-1(f)(5) for the definition of calendar day and business day.

(b) MONTH DEFINED.

(1) If the date prescribed for filing the return or paying tax is the last day of a calendar month, each succeeding calendar month or fraction thereof during which the failure to file or pay tax continues shall constitute a month for purposes of section 6651.

(2) If the date prescribed for filing the return or paying tax is a date other than the last day of a calendar month, the period which terminates with the date numerically corresponding thereto in the succeeding calendar month and each such successive period shall constitute a month for purposes of section 6651. If, in the month of February, there is no date corresponding to the date prescribed for filing the return or paying tax,

the period from such date in January through the last day of February shall constitute a month for purposes of section 6651. Thus, if a return is due on January 30, the first month shall end on February 28 (or 29 if a leap year), and the succeeding months shall end on March 30, April 30, etc.

(3) If a return is not timely filed or tax is not timely paid, the fact that the date prescribed for filing the return or paying tax, or the corresponding date in any succeeding calendar month, falls on a Saturday, Sunday, or a legal holiday is immaterial in determining the number of months for which the addition to the tax under section 6651 applies.

(c) SHOWING OF REASONABLE CAUSE.

(1) Except as provided in subparagraphs (3) and (4) of this paragraph (b), a taxpayer who wishes to avoid the addition to the tax for failure to file a tax return or pay tax must make an affirmative showing of all facts alleged as a reasonable cause for his failure to file such return or pay such tax on time in the form of a written statement containing a declaration that it is made under penalties of perjury. Such statement should be filed with the district director or the director of the service center with whom the return is required to be filed; PROVIDED, That where special tax returns of liquor dealers are delivered to an alcohol, tobacco and firearms officer working under the supervision of the Regional Director, Bureau of Alcohol, Tobacco and Firearms, such statement may be delivered with the return.

If the district director, the director of the service center, or, where applicable, the Regional Director,

Bureau of Alcohol, Tobacco and Firearms, determines that the delinquency was due to a reasonable cause and not to willful neglect, the addition to the tax will not be assessed. If the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time, then the delay is due to a reasonable cause. A failure to pay will be considered to be due to reasonable cause to the extent that the taxpayer has made a satisfactory showing that he exercised ordinary business care and prudence in providing for payment of his tax liability and was nevertheless either unable to pay the tax or would suffer an undue hardship (as described in Section 1.6161-1(b) of this chapter) if he paid on the due date. In determining whether the taxpayer was unable to pay the tax in spite of the exercise of ordinary business care and prudence in providing for payment of his tax liability, consideration will be given to all the facts and circumstances of the taxpayer's financial situation, including the amount and nature of the taxpayer's expenditures in light of the income (or other amounts) he could, at the time of such expenditures, reasonably expect to receive prior to the date prescribed for the payment of the tax. Thus, for example, a taxpayer who incurs lavish or extravagant living expenses in an amount such that the remainder of his assets and anticipated income will be insufficient to pay his tax, has not exercised ordinary business care and prudence in providing for the payment of his tax liability. Further, a taxpayer who invests funds in speculative or illiquid assets has not exercised ordinary business care and

prudence in providing for the payment of his tax liability unless, at the time of the investment, the remainder of the taxpayer's assets and estimated income will be sufficient to pay his tax or it can be reasonably foreseen that the speculative or illiquid investment made by the taxpayer can be utilized (by sale or as security for a loan) to realize sufficient funds to satisfy the tax liability. A taxpayer will be considered to have exercised ordinary business care and prudence if he made reasonable efforts to conserve sufficient assets in marketable form to satisfy his tax liability and nevertheless was unable to pay all or a portion of the tax when it became due.

(2) In determining if the taxpayer exercised ordinary business care and prudence in providing for the payment of his tax liability, consideration will be given to the nature of the tax which the taxpayer has failed to pay. Thus, for example, facts and circumstances which, because of the taxpayer's efforts to conserve assets in marketable form, may constitute reasonable cause for nonpayment of income taxes may not constitute reasonable cause for failure to pay over taxes described in section 7501 that are collected or withheld from any other person.

(3) If, for a taxable year ending on or after December 31, 1995, an individual taxpayer satisfies the requirement of Sec. 1.6081-4(a) of this chapter (relating to automatic extension of time for filing an individual income tax return), reasonable cause will be presumed, for the period of the extension of time to file, with respect to any underpayment of tax if-

(i) The excess of the amount of tax shown on the individual income tax return over the amount of tax paid on or before the regular due date of the return (by virtue of tax withheld by the employer, estimated tax payments, and any payment with an application for extension of time to file pursuant to Sec. 1.6081-4 of this chapter) is no greater than 10 percent of the amount of tax shown on the individual income tax return; and

(ii) Any balance due shown on the individual income tax return is remitted with the return.

(4) If, for a taxable year ending on or after December 31, 1972, a corporate taxpayer satisfies the requirements of Section 1.6081-3(a) or (b) (relating to an automatic extension of time for filing a corporation income tax return), reasonable cause shall be presumed, for the period of the extension of time to file, with respect to any underpayment of tax if--

(i) Not less than the amount of tax that would be required as the first installment under section 6152(a)(1), if the taxpayer elected to pay the tax in installments, is paid on or before the regular due date of the return and the second installment is paid on or before 3 months after such date,

(ii) The amount of tax (determined without regard to any prepayment thereof) shown on Form 7004, or the amount of tax paid on or before the regular due date of the return, is at least 90 percent of the amount of tax shown on the taxpayer's Form 1120, and

(iii) Any balance due shown on the Form 1120 is paid on, or before the due date of the return, including any extensions of time for filing.

Internal Revenue Manual ("IRM") [120.1] 1.1 08/20/98
Overview

1.This chapter discusses the new chapter format of the Penalty IRM 120.1. It also includes the purpose of penalties, criteria for penalty relief, methods of appealing penalties, master file indicators and administrative procedures.

[120.1] 1.1.1 08/20/98
Background

1.In 1955 there were approximately 14 penalty provisions in the Internal Revenue Code. There are now more than ten times that number. With the increasing number of penalty provisions, the Service recognized the need to develop a fair, consistent, and comprehensive approach to penalty administration.

2.In November 1987 the Commissioner established a task force to study civil penalties; in February 1989 the Commissioner's Executive Task Force issued a "Report on Civil Tax Penalties." The report established a philosophy concerning penalties, provided a statutory analysis of the three broad categories of penalties (filing of returns, payment of tax, accuracy of information), and made recommendations where warranted to resolve the inconsistencies. Those recommendations were, in part:

1.The Service should develop and adopt a single

penalty policy statement emphasizing that civil tax penalties exist for the purpose of encouraging voluntary compliance.

2.The Service should develop a single consolidated handbook on penalties for all employees. The handbook should be sufficiently detailed to serve as a practical everyday guide for most issues of penalty administration and provide clear guidance on computing penalties.

3.The Service should revise existing training programs to ensure consistent administration of penalties in all functions for the purpose of encouraging voluntary compliance.

4.The Service should examine its communications with taxpayers (including penalty notices and publications) to determine whether these communications do the best possible job of explaining why the penalty was imposed and how to avoid the penalty in the future.

5.The Service should finalize its review and analysis of the quality and clarity of machine-generated letters and notices used in the Adjustments and Correspondence Branches of the service centers.

6.The Service should consider ways to develop better information concerning the administration and effects of penalties. The Service should develop a master file database to provide statistical information regarding the administration of penalties. That information would be continuously reviewed for the purpose of suggesting changes in compliance programs, educational programs, penalty design and penalty

administration.

3.In keeping with the Commissioner's Executive Task Force Report and Congressional recommendations, the consolidated penalty IRM was developed.

[120.1] 1.1.2 08/20/98
Purpose of IRM 120.1

1.The purpose of the consolidated penalty handbook is to provide guidance to all areas of the Service for all penalties imposed by the Internal Revenue Code. It sets forth procedures both for assessing and abating penalties and contains discussions on topics such as various types of relief from the penalties.

2.IRM 120.1 replaces all other internal management documents dealing with the administration of penalties, such as IRMs and handbooks developed by various functions. IRM 120.1 is the primary source of authority for the administration of penalties by the Service. Service functions may develop reference materials for their individual needs, such as desk guides. However, such reference material must receive approval from the Office of Penalty Administration prior to distribution and remain consistent with (a) the procedures set forth in this IRM, and (b) the philosophy of the penalty policy statement.

3.The penalty manual serves as the foundation for addressing inconsistent administration of penalties by various Service functions. By providing one source of

authority for the administration of penalties, the Service greatly reduces inconsistencies regarding attitudes and procedures.

[120.1] 1.3 08/20/98
Relief From Penalties

1.Generally, relief from penalties falls into four separate categories. They are:

Reasonable Cause
Statutory Exceptions
Administrative Waivers
Correction of Service Error.

2.Appeals may recommend the abatement or nonassertion of a penalty based on these four criteria as well as "Hazards of Litigation."

3.This chapter discusses each of these categories and the related criteria. Also, see section 1.3 of LEM 120.1.

4.In the interest of fairness, the Service will consider requests for penalty relief received from third parties, including requests from representatives without an authorized power of attorney. While information may be accepted, NO taxpayer information may be discussed with a third party, unless a power of attorney or other acceptable authorization is secured in writing from the taxpayer. See 1.3 of LEM 120.1.

1.If additional information is needed, contact the taxpayer or the taxpayer's authorized representative.

2.If the validity of the request is questionable, contact the taxpayer.

3.In all cases involving third party requests for penalty relief, advise the taxpayer of the request and the action taken.

[120.1] 1.3.1 08/20/98
Reasonable Cause

1.Reasonable cause is based on all the facts and circumstances in each situation and allows the Service to provide relief from a penalty that would otherwise be assessed. Reasonable cause relief is generally granted when the taxpayer exercises ordinary business care and prudence in determining their tax obligations but is unable to comply with those obligations.

2.In the interest of equitable treatment of the taxpayer and effective tax administration, the nonassertion or abatement of civil penalties based on reasonable cause or other relief provisions provided in this IRM must be made in a consistent manner and should conform with the considerations specified in the Internal Revenue Code (IRC), Regulations (Treas. Regs.), Policy Statements, and Part 120.1.

3.Reasonable cause relief is not available for all penalties; however, other exceptions may apply.

1.For those penalties where reasonable cause can be considered, any reason which establishes that the taxpayer exercised ordinary business care and prudence,

but was unable to comply with a prescribed duty within the prescribed time, will be considered.

2.See IRM Exhibit 120.1.1-2, Penalty Relief-Application Chart. If a reasonable cause provision applies only to a specific Code section, that reasonable cause provision will be discussed in the IRM 120.1 chapter relating to that IRC section.

3.When considering the information provided in the following pages, remember that an acceptable explanation is not limited to those given in IRM 120.1. Penalty relief granted because the taxpayer provided an "other acceptable explanation" is identified by use of PRC 30 on either the closing or adjustment document.

4.The wording used to describe reasonable cause provisions varies. Some IRC penalty sections also require evidence that the taxpayer acted in good faith or that the taxpayer's failure to comply with the law was not due to willful neglect. See specific IRM sections for the rules that apply to a specific Code section.

5.Taxpayers have reasonable cause when their conduct justifies the nonassertion or abatement of a penalty. Each case must be judged individually based on the facts and circumstances at hand. Consider the following in conjunction with specific criteria identified in the remainder of IRM 1.3.

> What happened and when did it happen? During the period of time the taxpayer was non-compliant, what facts and circumstances prevented the taxpayer from filing a return, paying a tax, or otherwise complying with the law?

How did the facts and circumstances prevent the taxpayer from complying?
How did the taxpayer handle the remainder of their affairs during this time?
Once the facts and circumstances changed, what attempt did the taxpayer make to comply?

6.Reasonable cause does not exist if, after the facts and circumstances that explain the taxpayer's noncompliant behavior cease to exist, the taxpayer fails to comply with the tax obligation within a reasonable period of time.

[120.1] 1.3.1.1 08/20/98
Standards

1.Any reason that establishes a taxpayer exercised ordinary business care and prudence but was unable to comply with the tax law may be considered for penalty relief.

2.The following regulations contain examples of circumstances that may be helpful in determining if a taxpayer has established reasonable cause:

Accuracy-Related Penalty: 1.6664-4
Failure to Pay Penalty: 301.6651-1(c)
Failure to File: 301.6651-1(c)
Failure to Deposit Penalty: 301.6656-1(b); 301.6656-2(c)
Information Returns Penalty: 301.6723-1A(d);

301.6724-1
Preparer/Promoter Penalties: 1.6694-2(d);
301.6707-1T.

3.The following Internal Revenue Service Policy Statements contain specific criteria that may affect the imposition of penalties.

P-2-4, Penalties and interest not asserted against Federal agencies.

P-2-7, Reasonable cause for late filing of return or failure to deposit or pay tax when due.

P-2-9, Timely mailed returns bearing foreign postmarks.

P-2-11, Certain unsigned returns will be accepted for processing.

[120.1] 1.3.1.2 08/20/98
Ordinary Business Care and Prudence

1.Ordinary business care and prudence includes making provision for business obligations to be met when reasonably foreseeable events occur. A taxpayer may establish reasonable cause by providing facts and circumstances showing the taxpayer exercised ordinary business care and prudence (taking that degree of care that a reasonably prudent person would exercise), but nevertheless was unable to comply with the law.

2.In determining if the taxpayer exercised ordinary business care and prudence, review available information including the following:

A.Taxpayer's Reason. The taxpayer's reason

should address the penalty imposed. To show reasonable cause, the dates and explanations should clearly correspond with events on which the penalties are based. If the dates and explanations do not correspond to the events on which the penalties are based, request additional information from the taxpayer that may clarify the explanation (See IRM 120.1.1.3.1).

B.Compliance History. Check the preceding tax years (at least 2) for payment patterns and the taxpayer's overall compliance history. The same penalty, previously assessed or abated, may indicate that the taxpayer is not exercising ordinary business care. If this is the taxpayer's first incident of noncompliant behavior, weigh this factor with other reasons the taxpayer gives for reasonable cause, since a first time failure to comply does not by itself establish reasonable cause.

C.Length of Time. Consider the length of time between the event cited as a reason for the noncompliance and subsequent compliance. See IRM 120.1.1.3.1. Consider: (1) when the act was required by law, (2) the period of time during which the taxpayer was unable to comply with the law due to circumstances beyond the taxpayer's control, and (3) when the taxpayer complied with the law.

D.Circumstances Beyond the Taxpayer's Control. Consider whether or not the taxpayer could have anticipated the event that caused the noncompliance. Reasonable cause is generally established when the taxpayer exercises ordinary business care and prudence but, due to circumstances beyond the taxpayer's control, the taxpayer was

unable to timely meet the tax obligation. The taxpayer's obligation to meet the tax law requirements is ongoing. Ordinary business care and prudence requires that the taxpayer continue to attempt to meet the requirements, even though late.

3.Abatement of a penalty because the taxpayer established ordinary business care and prudence is identified by the use of Penalty Reason Code (PRC) 22.

[120.1] 1.3.1.2.1 08/20/98
Ignorance of the Law

1.In some instances taxpayers may not be aware of specific obligations to file and/or pay taxes. The ordinary business care and prudence standard requires that taxpayers make reasonable efforts to determine their tax obligations. Reasonable cause may be established if the taxpayer shows ignorance of the law in conjunction with other facts and circumstances.

2.For example, consider:

A.The taxpayer's education,

B.If the taxpayer has been subject to the tax,

C.If the taxpayer has been penalized, or

D.If there were recent changes in the tax forms or law which a taxpayer could not reasonably be expected to know.

3.The level of complexity of a tax or compliance issue is another factor that should be considered in evaluating reasonable cause because of ignorance of the law.

4.Reasonable cause should never be presumed, even in cases where ignorance of the law is claimed.

5.The taxpayer may have reasonable cause for noncompliance if:

A.A reasonable and good faith effort was made to comply with the law,
or

B.The taxpayer was unaware of a requirement and could not reasonably be expected to know of the requirement.

[120.1] 1.3.1.2.2 08/20/98
Mistake was Made

1.The taxpayer may try to establish reasonable cause by claiming that a mistake was made.

A.Generally, this is not in keeping with the ordinary business care and prudence standard and does not provide a basis for reasonable cause.

B.However, the reason for the mistake may be a supporting factor if additional facts and circumstances support the determination that the taxpayer exercised ordinary business care and prudence.

[120.1] 1.3.1.2.3 08/20/98
Forgetfulness

1.The taxpayer may try to establish reasonable cause by claiming forgetfulness or an oversight by the

taxpayer or another party caused the noncompliance. Generally, this is not in keeping with ordinary business care and prudence standard and does not provide a basis for reasonable cause.

A.Relying on another person to perform a required act is generally not sufficient for establishing reasonable cause.

B.It is the taxpayer's responsibility to file a timely and accurate return and to make timely deposits or payments. This responsibility cannot be delegated.

2.Information to consider when evaluating a request for an abatement or nonassertion of a penalty based on a mistake or a claim of ignorance of the law includes, but is not limited to:

When and how the taxpayer became aware of the mistake.

The extent to which the taxpayer corrected the mistake.

The relationship between the taxpayer and the subordinate.

If the taxpayer took timely steps to correct the failure after it was discovered.

The supporting documentation.

[120.1] 1.3.1.2.4 08/20/98
Death, Serious Illness, or Unavoidable Absence

1.Death, serious illness or unavoidable absence of the taxpayer may establish reasonable cause for late filing, payment, or deposit for the following:

A.An individual: If there was a death, serious illness, or unavoidable absence of the taxpayer or a death or serious illness in the taxpayer's immediate family (i.e. spouse, sibling, parents, grandparents, children). PRC 24 indicates the incident occurred to the individual or a member of that individual's immediate family for filing, paying, or depositing.

B.A corporation, estate, trust, etc.: If there was a death, serious illness, or other unavoidable absence of the taxpayer (or a member of such taxpayer's immediate family), and that taxpayer had sole authority to execute the return, make the deposit, or pay the tax (person responsible). PRC 26 indicates the incident occurred to the person responsible for filing, paying or depositing.

2.If someone, other than the taxpayer or the person responsible, is authorized to meet the obligation, consider the reasons why that person did not meet the obligation when evaluating the request for relief. In the case of a business, if only one person was authorized, determine whether this was in keeping with ordinary business care and prudence.

3.Information to consider when evaluating a request for penalty relief based on reasonable cause due to death, serious illness, or unavoidable absence includes, but is not limited to, the following:

1.The relationship of the taxpayer to the other parties involved.
2.The date of death.
3.The dates, duration, and severity of illness.
4.The dates and reasons for absence.
5.How the event prevented compliance.

6.If other business obligations were impaired, and

7.If tax duties were attended to promptly when the illness passed, or within a reasonable period of time after a death or absence.

[120.1] 1.3.1.2.5 08/20/98
Unable to Obtain Records

1.Explanations relating to the inability to obtain the necessary records may constitute reasonable cause in some instances, but may not in others.

2.Consider the facts and circumstances relevant to each case and evaluate the request for penalty relief.

3.If the taxpayer was unable to obtain records necessary to comply with a tax obligation, the taxpayer may or may not be able to establish reasonable cause. Reasonable cause may be established if the taxpayer exercised ordinary business care and prudence, but due to circumstances beyond the taxpayer's control they were unable to comply.

4.Information to consider when evaluating such a request includes, but is not limited to an explanation as to:

Why the records were needed to comply.
Why the records were unavailable and what steps were taken to secure the records.
When and how the taxpayer became aware that they did not have the necessary records.

If other means were explored to secure needed information.

Why the taxpayer did not estimate the information.

If the taxpayer contacted the Service for instructions on what to do about missing information.

If the taxpayer promptly complied once the missing information was received; and

Supporting documentation such as copies of letters written and responses received in an effort to get the needed information.

5.Use PRC 25 if the taxpayer establishes reasonable cause because of an inability to obtain the records necessary to comply with a tax or information filing requirement.

[120.1] 1.3.2 08/20/98
Statutory Exceptions & Administrative Waivers

1.These two very separate categories are placed together because in many instances an Administrative Waiver is an extension of rules that were provided for by statute.

[120.1] 1.3.2.1 08/20/98
Statutory Exceptions

1.Tax legislation (Internal Revenue Code (IRC)) may provide an exception to a penalty. Specific statutory exceptions can be found in either the penalty-related IRC section or the accompanying regulations. For example:

A.IRC section 6654(e)(1), (2), or (3), Estimated Tax Penalties for Individuals (IRM 120.1.3).

B.IRC section 7502(a) and 7502(e), Timely Mailing Treated as Timely Filing and Paying (IRM 120.1.2).

C.IRC section 6724(a) or 6724(c), Waiver; Definitions and Special Rules, Information Return Penalties (IRM 120.1.7).

D.IRC section 6404(f), Abatement of Penalty or Addition to Tax Attributable to Written Advice of the Internal Revenue Service (see IRM 120.1.1).

E.IRC section 7508, Time for performing certain Acts Postponed by Reason of Service in Combat Zone. This provision applies only in presidentially-declared "Combat Zone."

2.Legislation with retroactive provisions may provide guidance on associated penalties. As a result of that retroactive provision, the Service may issue a News Release or other guidance with instructions for the disposition of the related penalties.

3.Some Statutory Exceptions are assigned their own Penalty Reason Code (see the specific topic). However, many are not. Statutory Exceptions in

general are identified by the use of PRC 44.

[120.1] 1.3.2.2 08/20/98
Administrative Waiver

1.The Service may formally interpret or clarify a provision to provide administrative relief from a penalty that would otherwise be assessed. An administrative waiver may be addressed in either a Policy Statement, News Release, or other formal communication stating that the policy of the Service is to provide relief from a penalty under specific conditions.

2.An administrative waiver may be necessary when there is a delay by the Service in:

A.Printing or mailing of forms

B.Publishing guidance, writing of regulations, or

C.Other conditions.

3.An example of an administrative waiver is Notice 93-22, 1993-1 C.B. 305.

This allowed individuals who requested an automatic 4-month extension of time to file an income tax return, an extension of time without remitting the unpaid amount of any tax properly estimated to be due.

4.An administrative waiver is identified by PRC 43.

[120.1] 1.3.2.3 08/20/98
Undue Hardship

1.An undue hardship may support the granting of an extension of time for paying a tax or deficiency. Treas. Reg. 1.6161-1(b), provides that an undue hardship must be more than an inconvenience to the taxpayer. The taxpayer must show that they would sustain a substantial financial loss if forced to pay a tax or deficiency on the due date.

2.The extension of time to pay does not provide the taxpayer with an extension of time to file. Nor does the extension of time to pay relieve the taxpayer of any appropriate penalties.

3.Undue hardship generally does not affect a person's ability to file and therefore would not provide a basis for penalty relief in a failure to file situation. However, each request must be considered on a case-by-case basis. Undue hardship may establish reasonable cause for failure to file on magnetic media, under Treas. Reg. 301.6724-1.

4.Undue hardship may also support relief from the addition to tax for failure to pay tax if, the explanation for the noncompliance supports such a determination. However, the mere inability to pay does not ordinarily provide the basis for granting penalty relief. Under Treas. Reg. 301.6651-1(e), the taxpayer must also show that they exercised ordinary business care and prudence in providing for the payment of the tax liability.

A.The taxpayer may claim that enough funds

were on hand but, as a result of unanticipated events, the taxpayer was unable to pay the taxes.

B.Consider an individual taxpayer's inability to pay a factor when considering penalty relief if the taxpayer shows that, had the payment been made on the payment due date, undue hardship (as defined in Treas. Reg. 1.6161-1(b)) would have resulted. In the case where a taxpayer files bankruptcy, consider inability to pay a factor if the insolvency occurred before the tax payment date.

5.If a payroll was met, taxes were withheld and should be available for deposit. Employers must reserve money withheld from employees' wages in trust until deposited. The employer should not use the money for any other purpose.

Undue hardship does not support relief from the IRC section 6672, Failure to Collect and Pay Over Tax, or attempt to Evade or Defeat Tax (Trust Fund Recovery Program).

6.Information to consider when evaluating a request for penalty relief includes, but is not limited to, the following:

When did the taxpayer know they could not pay?

Why was the taxpayer unable to pay?

Did the taxpayer explore other means to secure the necessary funds?

What did the taxpayer supply in the way of supporting documentation, such as copies of bank statements?

Did the taxpayer pay when the funds became

available?

7.An abatement of a penalty because the taxpayer experienced a "undue hardship" is identified by the use of PRC 29.

[120.1] 1.3.2.4 08/20/98
Advice

1.This section discusses three basic types of advice: written and/or oral advice provided by the Service, and advice provided by a tax professional.

2.Information to consider when evaluating a request for abatement or nonassertion of a penalty due to reliance or advice, includes, but is not limited to, the following:

A.Was the advice in response to a specific request and was the advice received related to the facts contained in that request?

B.Did the taxpayer reasonably rely on the advice?

3.The following examples address situations where a taxpayer relies on written advice from the Service regarding an item on a filed return.

A.The taxpayer did not reasonably rely on the advice regarding an item included on a return if the advise was received after the date the return was filed;

B.A taxpayer may be considered to have reasonably relied on advice received after the return was filed if they then filed an amended return that conformed with such written advice;

C.A taxpayer may not be considered to have reasonably relied on written advice unrelated to an item included on a return, such as advice on the payment of estimated taxes, if the advice is received after the estimated tax payment was due.

4.Did the taxpayer provide the Service or the tax professional with adequate and accurate information?

5.The taxpayer is entitled to penalty relief for the period during which they relied on the advice. The period continues until the taxpayer is placed on notice that the advice is no longer correct or no longer represents the Service's position.

6.The taxpayer is placed on notice as the result of any of the following events that present a contrary position and occur after the issuance of the written advice:

A.Written correspondence from the Service that its advice is no longer correct or no longer represents the Service's position;

B.Enactment of legislation or ratification of a tax treaty;

C.A U.S. Supreme Court decision;

D.The issuance of temporary or final regulations; or

E.the publication of a revenue ruling, revenue procedure, or other statement in the Internal Revenue Bulletin.

7.Taxpayers should submit the necessary supporting information and documentation with Form 843, Claim. However, if the information provided demonstrates that abatement of the penalty is warranted,

the penalty should be abated, whether or not a Form 843 is provided.

[120.1] 1.3.2.4.1 08/20/98
Written Advice from the Service

1.The Service is required by IRC section 6404(f) and Treas. Reg. 301.6404-3 to abate any portion of any penalty attributable to erroneous written advice furnished by an officer or employee of the Service acting in their official capacity.

2.If the taxpayer does not meet the criteria for penalty relief under IRC section 6404, the taxpayer may qualify for other penalty relief. For instance, taxpayers who fail to meet all of the above criteria may still qualify for relief under reasonable cause if the Service determines that the taxpayer exercised ordinary business care and prudence in relying on the Service's written advice.

3.Penalties abated as a result of reliance on erroneously written advice from the Service should be identified by PRC 44, Statutory Exception.

[120.1] 1.3.2.4.2 08/20/98
Oral Advice from the Service

1.The Service may provide penalty relief based on a taxpayer's reliance on erroneous oral advice from the Service. The Service is required by IRC section 6404(f)

and Treas. Reg. 301.6404-3 to abate any portion of any penalty attributable to erroneously written advice furnished by an employee acting in their official capacity. Administratively, the Service has extended this relief to include erroneous oral advice when appropriate.

2.In addition to considering the criteria provided in above, consider the following:

A.Did the taxpayer exercise ordinary business care and prudence in relying on that advice?

B.Was there a clear relationship between the taxpayer's situation, the advice provided, and the penalty assessed?

C.What is the taxpayer's prior tax history and prior experience with the tax requirements?

D.Did the Service provide correct information by other means (such as tax forms and publications)?

E.What type of supporting documentation is available?

3.The following are types of supporting documentation:

A.A notation of the taxpayer's question to the Service;

B.Documentation regarding the advice provided by the Service;

C.Information regarding the office and method by which the advice was obtained;

D.The date the advice was provided, and

E.The name of the employee who provided the information.

4.Penalties abated as the result of reliance on erroneous oral advice provided by the Service should be

identified by using PRC 31 in the fourth reason code position.

[120.1] 1.3.2.4.3 08/20/98
Advice from a Tax Advisor

1.Reliance on the advice of a tax advisor generally relates to the reasonable cause exception in IRC section 6664(c) for the accuracy-related penalty under IRC section 6662. See IRM 120.1.5, Preparer Promoter Penalty, and Treas. Reg. 1.6664-4(c).

2.However, in very limited instances, reliance on the advice of a tax advisor may apply to other penalties when the tax advisor provides advice on a substantive tax issue.

3.Example: The employer researched all available Service publications on the subject of contract labor, provided clear and convincing documentation as to the duties of the workers to the tax advisor, and requested an opinion from the tax advisor as to whether the workers were "contract labor" or employees. As a result, the tax advisor advised the employer that the workers were "contract labor" . However, the Service later determined that the workers were "employees" and not "contract labor" .

4.Reliance on the advice of a tax advisor is limited to issues generally considered technical or complicated. The taxpayer's responsibility to file, pay or deposit taxes cannot be excused by reliance on the advice of a tax advisor.

[120.1] 1.3.2.5 08/20/98
Fire, Casualty, Natural Disaster, or Other Disturbance

1.Relief from a penalty may be requested if there was a failure to timely comply with a requirement to file a return or pay a tax as the result of a fire, casualty, natural disaster, or other disturbance.

2.Relief from a penalty because the taxpayer suffered from a fire, casualty, natural disaster, or other disturbance should be identified by the use of the appropriate PRC. It could be that as a result of the fire the taxpayer was unable to access their records (PRC 25) or as the result of an accident, the responsible party was hospitalized and unable to file the return or pay the tax
(PRC 24 or 26).

3.Fire, casualty, natural disaster, or other disturbance are factors to consider.

One of these circumstances by itself does not necessarily provide penalty relief.

4.Penalty relief may be appropriate if the taxpayer exercised ordinary business care and prudence, but due to circumstances beyond the taxpayer's control they were unable to comply with the law.

5.Factors to consider include:

Timing.
Effect on the taxpayer's business.
Steps taken to attempt to comply.
If the taxpayer complied when it became possible.

6.The determination to grant relief from each penalty must be based on the facts and circumstances surrounding each individual case.

[120.1] 1.3.2.6 08/20/98
Official Disaster Area

1.When a significant disaster occurs affecting a wide area of taxpayers, the Service often issues special instructions to facilitate evaluating the request for penalty relief.

A.Because there are one-time instructions, they will not be incorporated in this IRM. Districts, service centers, and customer service sites will be kept informed of any special instructions affecting their areas.

B.Penalty Relief granted because the taxpayer was located in an Official Disaster Area is identified by the use of PRC 28.

[120.1] 1.3.3 08/20/98
Service Error

1.A Service error can be any error made by the Service in computing or assessing tax, crediting accounts, etc. See Exhibit 120.1.1-3, Penalty Reason Code Chart, for the appropriate PRC to be used when abating either a computer-generated or manually-input penalty.

2.General Service Error (computer

generated--PRC 15). This PRC should be used to identify penalties abated as the result of a Master File Recovery.

3.When an analyst, from any area of the Service, identifies a computer programming application that caused a penalty to be assessed in error, that analyst should:

A.Contact Information Services (IS) to resolve the inadequate computer application , and

B.Include on the Request for Information Services (RIS) a statement indicating that PRC 15 must be used to identify any abatement of a penalty resulting from reversal of the computer application .

4.Other Service Error (manual input--PRC 45). This PRC should be used to identify penalties abated as the result of service errors that occur individually.

Some examples are:

A.A math error when manually computing a penalty,

B.An extension of time to file that did not post to the Master File, or

C.Any other error, when it can be shown that (a) the taxpayer did in fact comply with the law, and (b) the Service did not initially recognize that fact.

[120.1] 1.3.4 08/20/98
Requesting Penalty Relief

1.The initial request for relief may occur either after an examination, but before a penalty is actually

assessed, or with a return that is either filed or paid late.

2.When the request is received carefully analyze the taxpayer's reasons to determine if penalty relief if warranted. The burden of proof is generally upon the taxpayer.

3.Each request must be evaluated on its own merit including:

1.The events or parties involved, and

2.If the taxpayer exercised ordinary business care and prudence, but due to circumstances or events beyond the taxpayer's control the taxpayer was unable to meet the tax requirement or if other penalty relief criteria apply.

4.The taxpayer's obligation to meet the requirement is ongoing. Ordinary business care and prudence requires that the taxpayer continue to attempt to meet the requirements, even though late.

5.Determine if the taxpayer's explanation addresses the penalty imposed.

A.The dates and explanations should clearly correspond with events on which the penalties are based to show that the taxpayer is entitled to relief from the penalty.

B.Request additional information from the taxpayer to clarify the explanation if the dates and explanations do not correspond with the events on which the penalty are based.

6.Review available Service information (see IRM 1.3.1.2) in determining whether or not the taxpayer exercised ordinary business care and prudence.

Check the preceding tax years (at least two) for

payment patterns and the taxpayer's overall compliance history.

A.The same penalty, previously assessed, may indicate that the taxpayer is not exercising ordinary business care.

B.If this is the taxpayer's first incident of noncompliant behavior, weigh this factor with other reasons the taxpayer gives for relief, since a first time failure to comply does not by itself establish reasonable cause.

7.Consider the length of time between the event cited as a reason for the noncompliance and subsequent compliance. The length of time between events may serve to cancel or reduce the event's effect. Penalty relief may not be appropriate if after considering all facts and circumstances the taxpayer fails to timely correct noncompliant behavior.

8.The following are examples where penalty relief may not be appropriate.

A.The taxpayers claim that they were unable to comply with the filing requirement due to a death in the family. The death occurred several months prior to the due date of the return. The return was not filed until a year after the due date of the return.

B.Taxpayers claim that they were unable to comply with the filing requirement because the records necessary for filing were in the control of a third party, i.e., a bankruptcy trustee or an accountant.

The records were returned to the taxpayer well in advance of time the return was required to be filed. The return was not filed until several months after the

records were returned.

C.In both of the examples, the timing of the event may prevent the taxpayer from receiving penalty relief unless other factors justify the delay in filing.

9.Consider if the taxpayer could have anticipated the event that caused the non-compliance. See IRM 120.1.1.3.1.2.

[120.1] 1.3.4.1 08/20/98
Subsequent Requests for Penalty Relief

1.A second or subsequent request for penalty relief may be received after the initial request for relief has been denied.

2.If the review of the account indicates that the taxpayer's request for penalty relief was previously disallowed, review the circumstances of the previous denial.

A.Is the taxpayer submitting new information? If yes, consider the facts circumstances discussed in the new information. Abate the penalty, disallow the request, or send a letter informing the taxpayer that you are unable to consider (not consider) the request for penalty relief based on the new information provided and the information contained in the original disallowance.

B.If the taxpayer is not submitting new information then is the taxpayer requesting an appeal of the previous determination? If yes, forward the request to Appeals. If no, send the taxpayer a letter

stating that you are unable to consider (not consider) the case on the grounds of the previous determination.

C.If it is unclear what the taxpayer wants, contact the taxpayer to request clarifying information.

3.If the penalty was previously sustained in Appeals, forward the request to the appropriate Appeals office. (This may be identified by the presence of a TC 290 for $0.00 with a blocking series 96X on the account.)

[120.1] 1.3.4.2 08/20/98
Taxpayer Entitled to Relief

1.If the taxpayer provides an explanation that supports their request, waive or abate the applicable penalties. If the explanation applies to only a portion of the penalty, only that portion of the penalty should be waived or abated.

2.Document the decision and the basis for providing relief according to functional guidelines. Attach a copy of the information to the original return (if
available) or other transaction (input) document.

3.Decisions made by compliance personnel, with respect to penalties, should not ordinarily be changed by personnel within another functional area. Before considering relief for a penalty asserted by compliance personnel, contact that office to determine if the case should be returned to the originating office.

4.If relief is granted prior to assertion of the

penalty, use computer condition codes to suppress the automatic assertion of penalties. Functional areas that forward returns to be processed must request that the service center prevent the assessment of the penalty. This may be done by:

1. Writing "Reasonable Cause" or "Penalty Relief" (as appropriate) in the preprinted penalty block on the return or on Form 4364, Delinquency Computations;

2. Requesting the penalty assessment transaction code be input for zero amount;

3. Editing a computer condition code on the return; or

4. Preparing other forms appropriate for forwarding returns or penalty computations for processing.

5. In addition, annotate the appropriate PRC on the respective form or return.

5. If relief is granted after the assessment of a penalty, follow procedures for abating the penalty or the appropriate portion of the penalty. Adjustments to penalties that are due to reasonable cause should include Reason Code 62 and the appropriate PRC. See Exhibit 120.1.1-3.

6. If relief if warranted for only a portion of the penalty, manually compute and assess or abate the applicable penalty amount. This will prevent automatic assertion of the penalty for the full amount. Follow applicable penalty procedures in IRM 120.1.

[120.1] 1.3.4.3 08/20/98
Taxpayer Not Entitled to Relief

1.If the criteria for penalty relief has not been met, determine if additional information would be helpful to evaluate the taxpayer's request (see IRM 120.1.1.3.1).

2.If a final determination that the criteria for granting penalty relief was not established:

A.Document the decision and its basis according to functional guidelines, and

B.Attach a copy of the information to the original return (if available) or other transaction (input) document.

3.Employees denying a request for preassessment relief (prior to assessment) or abatement (after assessment), must provide written notification to the taxpayer of the denial and of the taxpayer's appeal rights, regardless of whether the request was received,

A.In person,

B.Over the phone, or

C.In writing.

4.The notice should include:

A.A complete explanation of the Service's decision and the basis for denial;

B.Information on the appeal procedures, including instructions on how to submit a written protest; and

C.Power of attorney information.

5.The Service has developed standardized letters that are used by various offices. They include:

IDRS Correspondex Letter 854(C), which is

generally used by service centers and district offices.

ACS LT38, which is used by the Automated Collection System.

Pattern letters 2413(P) and 2414(P), which are used by Collection District Offices.

6.Functions that process returns through the service center will need to alert the service center of their decision to deny penalty relief. This can be done by
writing "Penalty Relief Denied" in the appropriate preprinted penalty block on the return or on Form 4364, Delinquency Computations.

7.If a request for penalty relief if denied after assessment, request or input TC 290 for zero amount, using blocking series 98/99 (Appeals uses blocking series 96X) with Reason Code 62 and Hold Code 3.

[120.1] 1.4 08/20/98
Methods of Appealing Penalties

1.Various administrative and legislative remedies are provided for taxpayers who disagree with the Service's determination that they are liable for a particular penalty. Generally, when a taxpayer disagrees with our determination regarding a penalty they have the right to an administrativeappeal.

2.Taxpayers have the right to challenge the assertion or assessment of a penalty, and generally may do so at any stage in the penalty process.

Taxpayers may request:

A.A review of the penalty prior to assessment (e.g. deficiency procedures),

B.A penalty abatement after it is assessed and either before or after it is paid (postassessment review),

C.An abatement and refund after payment (claim for refund).

3.Taxpayers may indicate their disagreement with the Service verbally, in writing, or if paid, by filing a claim for refund or credit.

4.If agreement cannot be reached at the district or service center, the taxpayer may request a conference with the employee's immediate manager or in most cases the taxpayer may request that the case be forwarded to Appeals.

Taxpayers should provide a written request for consideration by Appeals.

5.The taxpayer may also file suit in court. depending on the procedural circumstances of the taxpayer's case, the taxpayer may petition the United States Tax Court or file a complaint with either the United States District Court having jurisdiction or the United States Court of Federal Claims, as appropriate. See Appeals Processing & Control Handbook.

Exhibit [120.1] 1.6-2 ((08/20/98))
Penalty Relief--Application Chart

PENALTY RELIEF--APPLICATION CHART

IRC Section	Type of Penalty	Reasonable Cause Relief	Other Relief
6651(a)(1)	Failure to File	Yes	Yes
6651(a)(2)	Failure to Pay when due	Yes	Yes
6651(a)(3)	Failure to Pay within 10 Days of Notice of Additional Tax Due	Yes	Yes
6651(d)	Failure to Pay within 10 Days of Final Notice and Demand	Yes	Yes
6651(f)	Fraudulent Failure to File	Yes	Yes
6652(a)(1)**	Failure to File Information Returns	Yes	Yes

6652(c)(1)	Failure to File Annual Return by Exempt Organization	Yes	Yes
6652(c)(2)	Failure to File Returns under IRC Section 6034 or 6043(b)	Yes	Yes
6652(d)(2)	Notification of Change in Status of a Plan	Yes	Yes
6652(e)	Information Required in Connection With Certain Plans of DeferredCompensation--Form5500	Yes	Yes
6652(h)	Failure to Give Notice to Recipients of Certain Pension, etc. Distributions	Yes	Yes
6652(l)	Failure to Give Written Explanation to Recipients of Certain Qualifying Rollover Distributions	Yes	Yes
6653(a)*	Negligence		

No	Yes*	
6653(b)*	Fraud	
No	Yes*	
6654	Estimated Tax Penalty on Individuals	
No	Statutory Exception	
6655	Estimated Tax Penalty on Corporations	
No	No	
6656(a)	Failure to Deposit	
Yes	Yes	
6657	Bad Check	
Yes	Yes	
6659*	Valuation Overstatement	
No	Yes	
6659A*	Overstatement of Pension Liabilities	
No	Yes	
6661*	Substantial Understatement	
No	Yes	
6662	Accuracy-Related	

Yes	Yes
6663	Fraud
Yes	Yes

6692	Failure to File Actuarial Report	
Yes	Yes	
6698	Failure to File Partnership Return	
Yes	Yes	
6721	Failure to File Correct Information Reporting Returns	
Yes	Yes	
6722	Failure to Furnish Correct Payee Statements	
Yes	Yes	
6723	Failure to Comply with other Information Reporting Requirement	
Yes	Yes	

* Repealed for tax returns filed after December 31, 1989

** Repealed for tax returns filed after December 31, 1986

[120.1] 2.1.3 08/20/98
Penalty Relief

1.IRM 120.1.1.3, provides guidance for determining if the taxpayer meets the criteria that will allow relief from a penalty. See Exhibit 120.1.1-3 of IRM 120.1.1 for a complete list of penalty reason codes (PRC).

1.If the taxpayer provides information that will allow penalty relief before assessment, recommend non-assertion of the penalty only for the period for which the taxpayer meets the relief criteria.

2.If the taxpayer provides information that will allow penalty relief after the penalty is assessed, abate the portion of the penalty only for the period for which the taxpayer meets the relief criteria.

2.The Service will not impose the FTF/FTP penalty when the taxpayer shows reasonable cause and not willful neglect for the failure to file a return or pay a tax as required.

1.Reasonable cause determinations MUST be made on the individual facts and circumstances of each case. IRM 120.1.1.3 provides guidance for determining if the taxpayer established reasonable cause.

2.Generally, the taxpayer must pay the tax due before the Service will abate a FTP penalty for reasonable cause. The penalty continues to accrue until the tax is paid. The taxpayer may have reasonable cause for some months, but not for others. A correct

determination cannot be made until after the tax is paid.

3.Contacted personnel should address the reason for the failure to file or pay penalty when securing or examining returns on which the penalty applies.

Making this initial determination will prevent the need for subsequent abatements.

1.If the taxpayer establishes any of the penalty relief criteria before assessment, recommend non-assertion of the penalty only for the applicable period.

2.If the taxpayer establishes any of the penalty relief criteria after assessment, abate the portion of the penalty only for the period for the applicable period. Enter Reason Code (RC) 62 in any of the first three reason code fields for adjustments involving requests for reasonable cause consideration, and the applicable penalty reason code (PRC) in the fourth reason code field.

4.In addition to the common reasons given for reasonable cause determinations in IRM 120.1.1.3, the following are examples of sound causes for delay in paying which, if established, will be accepted as "other" reasonable cause.

1.Taxpayer was unable to determine the amount of tax due for reasons beyond the taxpayer's control.

2.The taxpayer's ability to make payments was materially impaired by civil disturbances. Consider this only if the area was declared a disaster area.

3.Lack of funds is an acceptable explanation for failure to pay any tax only when the taxpayer can demonstrate the lack of funds occurred despite the exercise of ordinary business care and prudence.

5.When the FTF/FTP penalties are abated for reasonable cause, TC 271 with RC 62, Master File will not restrict future computer computations of FTP penalty (provided it was not previously restricted) . The computer continues to compute the FTP penalty but will waive the amount associated with RC 62.

1.A TC 270 or 271 input without RC 62 restricts subsequent computation of the penalty.

2.Input TC 272 with a zero amount to remove the manual restriction on failure to pay penalty, when you determine that a module was restricted in error. See IRM 120.1.2.4 for the procedures applicable when it is determined that the FTP penalty is to be computed from the original due date of the return.

3.See 2.1.3.7 of LEM 120.1.2.

[120.1] 3.4 08/20/98
Adjustments after Penalty Assessment

1.This section will discuss the procedures and criteria for abatement or waiver of estimated tax penalties.

[120.1] 3.4.1 08/20/98

Evaluating Claims for Abatement or Waiver of Estimated Tax Penalties

1.For periods prior to January 1, 1984, there was NO basis for waiver of the estimated tax penalty. For periods after December 31, 1983, specific waiver provisions under IRC section 6654(e) were adopted.

2.To evaluate these requests use data available via the various CFOL commands, if possible, as it should expedite processing of the request. In some cases it may be necessary to secure the original return. Review taxpayer's request and the return data for the following items:

A.The amount of estimated tax penalty requested to be waived; and

B.Taxpayer's explanation of eligibility for estimated tax penalty waiver.

3.Request additional information from the taxpayer, as needed.

4.If the taxpayer establishes the waiver criteria take the necessary action to suppress or adjust the penalty as appropriate.

5.When a determination is made to cancel an estimated tax penalty because the individual is entitled to a waiver, the appropriate Penalty Reason Code must be entered either on the case file or the input document and entered into the Master File.

[120.1] 3.4.1.1 08/20/98

Procedures for Claiming an Abatement or Waiver of the Estimated Tax Penalty

1. Taxpayers may claim abatement or waiver on their tax return or on Form 2210 or 2210F. They may send a letter or other correspondence requesting abatement or waiver of the estimated tax penalty. The request could also be made by personal (face to face) contact. See IRM 120.1.3.4.1.2, Waivers based on Legislative Action.

2. To claim a waiver, based on a change to the tax law, the affected taxpayers should:

A. Compute the penalty (by completing Form 2210 or 2210F) on the basis of the law in effect before the changes were made, and on the basis of the law in effect after the changes were made. The penalty amount eligible for the waiver is the difference between the two computations.

B. If preparing Form 2210 or 2210F, follow the instructions for completing the form.

C. The taxpayer should attach an explanation showing their computation and the amount of penalty to be waived.

D. If the required information is available, verify the computation (math) and attachments. Review the explanation of "waiver eligibility" . The explanation must show what caused the tax increase and related underpayment of estimated tax.

[120.1] 3.4.1.2 08/20/98
Waivers Based on Legislative Action

1.The Taxpayer Relief Act of 1997 waives the estimated tax penalties for any payment due before January 16, 1998, with respect to any underpayment attributable to such period to the extent such underpayment was created or increased by any provision of the Act.

2.The Small Business Job Protection Act of 1996 provides a waiver for all or part of the estimated tax penalty for an underpayment of any installments due before August 20, 1996, to the extent that such increased underpayment was created by a provision of the Act. Instructions for claiming this waiver are included in the 1996 Form 2210 instructions.

3.For any period beginning before April 16, 1994, the Service will waive the estimated tax penalty to the extent an underpayment was created or increased by the Omnibus Budget Reconciliation Act (OBRA) of 1993.

4.In Notice 92-6, 1992-1 C.B. 495, the Service announced the waiver of penalties for tax year 1992, to the extent the underpayment by an employee or retiree is attributable to a reduction in Federal income tax withholding for 1992 caused by the new withholding tables/rates effective for wages paid after February 1992.

5.For 1988, estimated tax penalty relief was provided because of changes made by the Technical and Miscellaneous Revenue Act of 1988. These changes allowed individuals until April 15, 1989, to pay any

underpayment on estimated tax due to changes made by Titles I and/or II of this Act.

A.The taxpayer's needs to specify which provisions of Titles I and/or II of the Act Sections 1001 through 2006 resulted in a tax increase that was the cause of the underpayment.

B.See Announcement 89-2, IRB 1989-2, 19.

6.For first quarter 1988 estimated tax payment(s) only, the estimated tax penalty under IRC section 6654 may be waived against owners of a partnership or "S" corporation who were precluded from timely and accurately estimating and paying their 1988 individual first quarter payments, if they meet the following conditions:

A.The partnership or "S" corporation was unable to make an IRC section 444 election to change its taxable year by April 15, 1988, the due date of the owner's first quarter payment, because the regulations concerning the election had not been issued by IRS; and

B.As a result of the delay in making an election, the partnership or "S"corporation was unable to provide the owners with the information necessary for accurately estimating the amount of the first quarter estimated tax payment.

C.Taxpayers in this situation who received an estimated tax penalty notice were instructed to return the notice to IRS with an explanation that they are eligible for a penalty waiver under Section III-B of IR Bulletin Notice 88-49, 1988-C.B. 532. They were also asked to include identification of the partnership(s) or "S" corporation(s) (or both) and the portion of the

penalty attributable to each such entity.

D.Allow the waiver on the first installment only, from its due date through August 15, 1988.

E.Only the portion of the penalty attributable to IRC section 444 can be waived.

7.For the 1987 taxable year the Service will waive the penalty due to under withholding of any individual who files, in good faith, a 1987 Form W-4 or W-4A with their employer on or before June 1, 1987.

A.The amount of penalty to be waived is based on the ratio of wage and pension income to adjusted gross income (AGI).

B.For example, a taxpayer whose wages equal 75 percent of AGI could have 75 percent of the penalty waived.

8.For the 1987 taxable year, the Service will waive penalties attributable to taxable retirement income.

9.For 1986, penalty relief was provided due to changes made by Tax Reform Act of 1986 (TRA '86). Taxpayers were given until April 15, 1987, to pay any underpayment resulting from TRA '86. See Rev. Rul. 86-146, 1986-2 C.B. 208.

[120.1] 3.4.1.3 08/20/98
Waivers based on Legislative Action--Form 1041

1.The Tax Reform Act of 1986 placed certain trusts and estates (Form 1041) under the same rules as individuals for making payments of estimated tax, effective for tax years beginning after December 31,

1986.

2.In implementing this provision, an administrative decision was made to waive Form 1041 estimated tax penalties for installments of estimated tax due before July 1, 1987, provided the fiduciary made a good faith effort to determine the amount of the required installment and timely pay the tax. See Notice 88-15, 1988-1 C.B. 482 and Notice 87-32, 1987-1 C.B. 477.

[120.1] 3.4.1.4 08/20/98
Waiver Criteria Under IRC Section 6654(e)(3)(A)

1.For tax years beginning after December 31, 1983, IRC Section 6654(e)(3)(A) provides that the estimated tax penalty may be waived if the failure to make the estimated tax payment is due to casualty, disaster or other unusual circumstances such that the imposition of the penalty would be against equity and good conscience. This is not equivalent to reasonable cause .

2.For example, reliance on the advice of a competent tax advisor may constitute reasonable cause that would warrant relief from other penalties, but it does not provide a basis for a waiver of the estimated tax penalty under IRC section 6654(e)(3)(A).

3.In order for the waiver to be available, the failure to make the payment must be caused by:

Casualty Disaster, or
Other unusual circumstances, and
Imposition of the penalty would be against

equity and good conscience.

4.Examples of situations where the waiver may be granted if it is determined that imposition of the penalty would be against equity and good conscience:

A.The taxpayer's records are destroyed by fire or flood or other natural disaster. In many instances of natural disaster, area wide guidance on conditions for waivers will be issued.

B.The taxpayer becomes seriously ill or is seriously injured and is unable to manage his affairs.

C.The taxpayer designates that an overpayment of tax shown on a prior return is to be credited against estimated tax, but the overpayment is offset for either past-due child support or nontax federal debt under IRC section 6402(c), and the taxpayer is not notified of the offset before the due date of the estimated tax installment.

5.Examples of situations where the waiver may not be granted:

A.Reliance on the advice of a competent tax advisor.

B.Retroactive application of a statute or regulation unless the statute or regulation specifically grants a waiver of the estimated tax penalty or the Service announces in the Internal Revenue Bulletin that such a waiver has been granted.

C.Erroneous advice from the IRS unless such advice falls within the provisions of IRC section 6404(f), Abatement of Any Penalty or Addition to Tax Attributable to Erroneous Written Advice by the Internal Revenue Service, of the Internal Revenue Code

or IRC section 301.6404-3 of the regulations.

6.Requests for a waiver of the estimated tax penalty under IRC section 6654(e)(3)(A) must be submitted in writing and signed by the taxpayer.

Waivers may not be granted based on an oral request from the taxpayer.

Waiver of the penalty must be specifically approved by a manager or managerial official.

[120.1] 3.4.1.5 08/20/98
Waiver Criteria under IRC Section 6654(e)(3)(B)

1.Taxpayers may be eligible for a "waiver" of the penalty under IRC section 6654(e)(3)(B) if during the tax year they:

A.Retire after having attained age 62, or

B.Become disabled in the taxable year estimated payments are due, or during the preceding taxable year, and

C.The underpayment is due to reasonable cause and not willful neglect.

D.Reasonable Cause, as it applies to the estimated tax penalty for an individual, is considered only when the individual meets the conditions in (a) or (b) and (c) above, and then only to determine if the taxpayer is eligible for a "waiver" of the penalty. See IRM 120.1.1.3, Relief from Penalties.

2.When the individual qualifies for this statutory waiver, the estimated tax penalty should be abated using

penalty reason code "44" to identify the abatement.

[120.1] 3.4.1.6 08/20/98
Bankruptcy: IRC Section 6658

1.IRC section 6658 prohibits the assertion of the estimated tax penalty on liabilities during the time the case is pending a Title 11 bankruptcy proceeding filed on or after October 1, 1979, if:

A.The tax was incurred by the estate and the failure occurred pursuant to an order of the court finding probable lack of funds for the estate to pay administrative expenses, or

B.The tax was incurred by the debtor before the order of relief or the appointment of a trustee in an involuntary case, whichever is earlier, and

C.The bankruptcy petition is filed before the due date of the return including extensions, or

D.The date for making the addition to the tax occurs on or after the day on which the petition was filed.

[120.1] 3.4.1.7 08/20/98
Request for Abatement Due to an Erroneous Refund of Estimated Tax Payment, Offset, or Overpayment (Credit Elect)

1.If the taxpayer claims that an overpayment

(credit elect) was refunded in error or if an estimated tax payment was erroneously refunded by the Service, the taxpayer may be entitled to have a portion of the penalty abated.

Verify the taxpayer's statement by requesting the prior year return and reviewing account information

A.Abate the penalty if the taxpayer promptly returns the refund check or repays the refund amount within 10 days of its issue. Consider each case individually to determine if the refund was returned or repaid promptly.

B.If the overpayment (credit elect) was offset by IRS for either past-due child support nontax amounts owed to other federal government agencies and the taxpayer was not notified prior to the estimated tax payment due date, abate the penalty if the taxpayer promptly repaid the amount offset.

C.Example: A taxpayer has an extension to October 15th to file the return. The return has an overpayment that the taxpayer elects as a credit to the next year's return. If this overpayment is offset and the taxpayer does not receive a notice until December , the repayment may be considered prompt even if not received until December or early January of the following year. This repayment should still be considered as the taxpayer's first quarterly installment for penalty consideration.

[120.1] 3.4.2 08/20/98
Denying the Request for a Waiver

1.If the waiver is denied, send a letter informing the taxpayer of the reason for denial and explaining his/her appeal rights.

[120.1] 3.4.3 08/20/98
Penalty Appeal Procedures

1.For a complete discussion of penalty appeals, refer to IRM 120.1.1.

[120.1] 6.1.3 08/20/98
Appeal Rights

1.Relating to IRC sections 6700 and 6701: The person/preparer/promoter may appeal the district's or service center's denial of a claim for refund.

Administrative appeal rights will be granted by the district or service center examiner when the basis for the claim does not conflict with section 601.106(b) of the Statement of Procedural Rules. An appeal should not be based on moral, political, constitutional, religious, or similar arguments. If the claim is denied on appeal and the Service assesses a penalty and issues a notice and demand:

A.The person may suspend collection activity by paying at least 15 percent of the penalty and filing a

claim for refund within 30 days after the date of notice and demand.

B.However, the person must then bring suit in Federal District Court within 30 days of receiving a Notice of Claim Disallowance, or 30 days after the expiration of six months from the filing of the claim, whichever is earlier; or

C.The person may bring a refund suit in either the U.S. Court of Federal Claims or a district court within two years of the date of denial of the claim or upon the expiration of six months after the date of filing the claim, if the penalty has been paid in full.

2.Relating to IRC sections 6694 and 6695:

A.Unagreed Cases. Examination procedures provide that an unagreed income tax return preparer penalty case under IRC section 6694 or 6695 will not be sent to Appeals before the related unagreed income tax case is submitted to Appeals. If the two cases are submitted separately, Examination will include in the preparer case file information on the current status and location of the unagreed deficiency.

B.Relationship to Deficiency Procedures. IRC section 6696(b) indicates that deficiency procedures do not apply to IRC sections 6694 and 6695 penalties. However, Treas. Reg. 1.6694-4(a)(1) allows a preassessment appeals procedure. Examination sends the

preparer a 30-day letter, L-1125(DO), providing information on appeal rights. If there is no timely response to the letter, the penalty is assessed. (See Publication 5, Appeal Rights and Preparation of

Protests for Unagreed Cases, for appeal procedures.) If the preparer requests preassessment Appeals consideration, the request will be granted for penalties under IRC sections 6694 and 6695(b). Although the regulation only relates to the IRC section 6694 penalty, district and service center examiners will follow the same guidelines for IRC section 6695 penalties. With the exception of subsection 6695(f), all IRC section 6695 penalties will have post-assessment penalty appeal procedures only. Post-assessment appeal rights will also be given for penalties under IRC section 6713.

3.Short Statute. If the statutory period for assessment of the IRC section 6694(a) penalty is about to expire and the preparer will not agree to an extension, the District Director will assess the penalty. The preparer, upon request, will be provided postassessment appeal rights in the same way preassessment appeal rights would have been provided.

A.Examiners will not submit preparer penalty cases to Appeals if less than 120 days remain on the statute of limitations. In these instances examiners will first solicit an extension of the statutry period for assessment.

B.Unagreed return preparer cases will not be submitted before the related unagreed income tax case is submitted, or the related agreed income tax case is closed from the examination group.

CIVIL NO. 1:97CV349

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

GORDON M. and EDITH C. BROWNE

v.

UNITED STATES OF AMERICA

COMPLAINT FOR REFUND OF INTEREST AND PENALTIES

1. Introduction

This is not a tax refund case. Plaintiffs bring this action for a refund of the penalty and interest collected by the Internal Revenue Service ("IRS" or "Service") on the plaintiffs' tax years 1993, 1994 and 1995. This action is brought under the First Amendment to the Constitution; the Supreme Court decisions in Bowen v. Roy, 476 U.S. 706 (1986) and Employment Div.. Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872 (1990); the Religious Freedom Restoration Act of 1993 ("RFRA"), 107 State. 1488, 42 U.S.C. § 2000bb et seq;(fn1) Internal Revenue Code §§ 7422 el seq. (civil actions for refund), § 6404(e) and (f) (abatement of interest), § 665 1(a)(2) (failure to pay taxes), § 6654(e)(3) (A) and (B)(ii) (estimated tax penalty) and Treasury Regulation § 301.6651-1(c)(1). The plaintiffs, Quakers, had a reasonable cause for failure to pay, to wit: Their deeply held religious beliefs prohibit their participation in war, including paying for war through their taxes. Therefore, the Service abused its discretion in not applying its established exception to the assessment of penalties and interest for reasonable

cause to these individuals who acted based on their deeply held religious beliefs.

2. Jurisdiction

Jurisdiction is founded upon 28 U.S.C. § 1340 (civil action arising under Act of Congress providing for internal revenue), 28 U.S.C. § 1346(a)(1) (civil action against United States for recovery of tax or other sum wrongfully collected under internal revenue laws), 26 U.S.C. § 7422 (civil action for refund), and 28 U.S.C. § 1331 (civil action arising under the Constitution, laws or treaties of the United States).

3. Venue

Venue is proper under 28 U.S.C. § 1391(e)(3) (Plaintiff*s place of residence).

4. Parties

A. Gordon and Edith Browne are responsible citizens. They are members of the Religious Society of Friends (Quakers).

They do not challenge the Courts* rulings concerning the right of the Service to collect taxes in the face of a religious challenge. They challenge the method chosen to collect those taxes through delay and with penalties and interest.

Before his retirement on August 31, 1988 as the Executive Secretary of the Friends World Committee for Consultation, Section of the Americas, an international organization of Friends, Gordon Browne served on the Friends* Committee on War Tax Concerns, a committee to study and lead Friends* organizations in "Military Tax"

issues. Together, the Brownes began to question whether, contrary to the historical Quaker refusal to participate in war, they were willing participants in war by voluntarily paying for the military with their taxes. They knew that failure to pay voluntarily would result in the IRS collecting the taxes non-voluntarily. They discussed between themselves whether, knowing that the IRS would probably get the tax money through levy or other non-voluntary means, their beliefs compelled them not to participate in war in the form of voluntarily paying for it. They held meetings with a Committee of Clearness [a group of members of their monthly meeting [church] selected to discern if this was a true leading by God or only an individual impulse].(fn2) The Committee of Clearness recorded their support of the Brownes* proposed action as a true leading from God. The Brownes concluded that they could no longer voluntarily pay for others to do what they could not do themselves: participate in war.

Their religious beliefs, therefore, compelled them to withhold the portion of their tax moneys equivalent to the money the government was allocating to the Department of Defense. The Brownes*s faith kept them from voluntarily paying that portion to the government. The Brownes have never tried to deceive the IRS. Each year they have filed an accurate return in a timely manner and sent a letter to the IRS accompanying their tax return in which they made clear the compelling religious reasons for their open and forthright refusal to pay a portion of their taxes. They have paid the non-military portion of their federal taxes and all of their state and local taxes in a prompt and conscientious manner. They have made no effort to hide their assets.

They have not personally benefitted from their refusal to pay taxes. The tax money has not sat in their bank accounts earning them money. For all the tax money that was

not paid to the IRS with the tax return, an equivalent amount was paid to beneficent organizations, the antithesis of the use of the money for war and its preparation. Subsequently the tax amount was involuntarily paid to the Service.

They filed this action to contest the Service*s imposition of interest and penalties which arise solely from the Services failure to take reasonable, practical and efficient steps to accommodate their religion.

B. The United States is the appropriate party in an action for refund of penalty or interest assessed by the Internal Revenue Service. IRC § 7422(0(1).

5. Facts pertinent to all claims

C. (1) The Brownes filed their 1993 tax return by first class mail on April 11, 1994. The return was accurate and included full payment except for 28% representing the Department of Defense portion. A letter accompanied the return delineating the Brownes' religious hardship. (Attachment "A")

(2) The Service first contacted the Brownes in writing concerning their 1993 tax deficiency on June 27, 1994.

(3) The Brownes promptly replied to the IRS concerning the tax deficiency on July 4, 1994.

(4) The IRS was aware of where the Brownes* assets were located at the time of the June 27, 1994 letter.

(5) The IRS began collecting the 1993 tax in April 1995 and completed collecting the tax in June 1996, more than two years since first contacting the Brownes.

D. (1) The Brownes filed their 1994 tax return by first class mail on April 14, 1995. The return was accurate and included full payment except for 28% representing the

Department of Defense portion. A letter accompanied the return delineating the Brownes* religious hardship. (Attachment "B")

(2) The Service first contacted the Brownes in writing concerning their 1994 tax deficiency on July 3, 1995.

(3) The Brownes promptly replied to the IRS concerning the tax deficiency on July 11,
1995.

(4) The IRS was aware of where the Brownes* assets were located at the time of July 3,
1995.

(5) The IRS began collecting the tax on February 13, 1996 and completed collecting the tax on the same date, more than six months since first contacting the Brownes.

E. (1) The Brownes filed their 1995 tax return by first class mail on April 5, 1996. The
denying the claims for abatement of interest and penalties based on religious hardship.

K. There is no relationship between the penalties and any fees incurred in the collection efforts necessitated by the Brownes' failure to pay taxes.

L. The Service spent an insignificant amount of time and internal resources in the collection of the taxes in the over two years it took to collect them from sources of which it had knowledge at the very time of the filing of the 1993 return.

M. Both RFRA and the Internal Revenue Regulations take into account religious hardship as a basis for abatement of penalties. If the Service had taken religious hardship into account the Brownes would not have paid penalties and interest. Rather than having many months of penalties and interest levied from their accounts along with the underlying tax many months after their open refusal to pay, the Brownes would have had only the tax levied in a few months. This

would have been the least restrictive alternative and most efficient action for the Service.

N. The penalties and interest that the Brownes paid through levy because the Internal Revenue Service failed to take into account religious hardship constitute a tax on the Brownes' religious beliefs and violate the First Amendment of the Constitution, RFRA and Internal Revenue Regulations.

6. Exhaustion of Administrative Remedies

0. Plaintiffs are required to request a refund of any penalties or interest wrongfully collected by the Service. IRC § 7422(a). Plaintiffs made their original request for refund of penalties and interest on March 24, 1997. It was denied finally on May 2, 1997 by certified mail.

FIRST CLAIM:
IN VIOLATION OF THE PLAINTIFFS' CONSTITUTIONAL RIGHTS AS DELINEATED UNDER ROY AND SMITH, THE SERVICE ABUSED ITS DISCRETION BY FAILING TO ABATE THE PENALTY ASSESSED BY IT FOR TAX YEARS 1993, 1994 AND 1995

P. All the previous paragraphs are adopted by reference in their entirety.

Q. Internal Revenue Code § 665 1(a)(2) provides in pertinent part:

In case of failure--

to pay the amount shown on any return. . . unless it is shown that such failure is due to reasonable cause and not due to willful neglect.

R. Treasury Regulation § 301.6651-1(1) states in pertinent part:

Showing of reasonable cause.-

...[A] taxpayer who wishes to avoid the addition to the tax for failure to. . .pay tax must make an affirmative showing of all facts alleged as a reasonable cause for his failure to... pay such tax on time in the form of a written statement containing a declaration that it is made under penalty of perjury. Such statement should be filed with the district director or the director of the service center with whom the return is required to be filed.

S. Section 6654(e)(3)(A) provides that no estimated tax penalty shall be imposed:

to the extent that the Secretary determines that by reason of casualty, disaster, or other unusual circumstances the imposition of such addition to tax would be against equity and good conscience. (emphasis added)

T. As the plurality pointed out in Roy, our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to case of "religious hardship" without compelling reason.

[Citations omitted] Smith, supra, 494 U.S. at 885.(fn3)

> The "good cause" standard created a mechanism for individualized exemptions. If a state creates such a mechanism, its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent. Thus, as was used in Thomas, to consider a religiously motivated resignation to be "without good cause" tends to exhibit hostility, not neutrality, towards religion.

Bowen v. Roy, 476 U.S. at 708.

U. Since IRC § 665 1(a)(2), Treas. Reg. § 301.6651-1(1), and IRC § 6654(3)(A) create a "system of individual exemptions, [the Service] may not refuse to extend that system to cases of 'religious hardship* without compelling reason." Smith 494 U.S. at 885.

V. The Brownes' religious beliefs would constitute an "unusual circumstance" that in "good conscience" should prohibit the imposition of the estimated tax penalty.

W. The Service's failure to abate the Brownes' penalty due to their religious hardship is a violation of the Brownes* First Amendment Right to Freedom of Religion. The failure to abate the penalties in the case of religious hardship should be declared unconstitutional and the penalties abated.

SECOND CLAIM

IN VIOLATION OF THE PLAINTIFFS' CONSTITUTIONAL RIGHTS AS DELiNEATED UNDER SMITH, THE SERVICE ABUSED ITS DISCRETION BY FAILING TO ABATE THE INTEREST ASSESSED BY IT FOR TAX YEARS 1993, 1994 AND 1995.

X. All prior paragraphs are adopted by reference in their entirety.

Y. IRC § 6404(e) states in pertinent part:

--In the case of any assessment of interest on --

6404(e)(1)(A) any deficiency attributable in whole or in part to any error or delay by an officer or employee of the Internal Revenue Service (acting in his official capacity) in performing a ministerial act,...

the Service may abate the assessment of all or any part of such interest for any period. For purposes of the preceding, an error or delay shall be taken into account only if no significant aspect of such error or delay can be attributed to the taxpayer involved, and after the Internal Revenue Service has contacted the taxpayer in writing with respect to such deficiency or payment.

Z. Since the IRC § 6404 creates a "system of individual exemptions, [the Service] may not refuse to extend that system to the case of 'religious hardship* without compelling reason." Smith at 885. The Service*s refusal to extend that system of individual hardships is a violation of the Brownes' First Amendment rights.

AA. Since the Service delayed the collection of taxes even though they had all the pertinent information to collect the taxes for as much as two years, it must abate the interest in the above situations under its own regulations.

THIRD CLAIM

iN VIOLATION OF THE PLAINTIFFS' RIGHTS AS DELINEATED UNDER RFRA, THE SERVICE ABUSED ITS DISCRETION BY FAILING TO WAWE THE PENALTY ASSESSED BY IT FOR TAX YEARS 1993, 1994 AND 1995.

BB. All prior paragraphs are adopted by reference in their entirety.

CC. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb provides in pertinent part:

> (a) In general. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
>
> (b) Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person --
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

EE. The least restrictive means is what--ultimately--the Service did after using the more

restrictive means of trying to use penalties to punish the Brownes into "voluntarily" paying. The Service simply collected the taxes from the Brownes in a compulsory manner: by levy.

The imposition of the penalty on the Brownes does not assist the government in the

collection of the tax. The Brownes refused to pay taxes voluntarily in spite of the imposition of penalties. Furthermore, the IRS had no problem collecting the taxes that the Brownes did not voluntarily pay over, since the Brownes did nothing to hide the various accounts from which the IRS ultimately collected those taxes by levy. The imposition of penalties, therefore, is not "the least restrictive means of furthering [the applicable] compelling governmental interest." 42 U.S.C. § 2000bb(b)(2).

> FF. Therefore, the Service should have accommodated the Brownes by, once it ascertained that it was dealing with a religious hardship case, skipping the TWO YEARS of additional penalties and interest in which ever increasing demands for payment are made. Only one letter of notice of levy would have been sufficient to meet due process requirements.

GG. Since the IRS failed to use the "least restrictive means" to effect its "compelling government interest" in collecting taxes, it violated the Brownes' rights under RFRA and the penalties should be abated. The failure to abate penalties in the case of religious hardship should be declared unconstitutional and the penalties should be abated.

FOURTH CLAIM

IN VIOLATION OF THE PLAINTIFFS' RIGHTS AS DELINEATED UNDER RFRA, THE SERVICE ABUSED ITS DISCRETION BY FAILING TO ABATE THE INTEREST ASSESSED BY IT FOR TAX YEARS 1993, 1994 AND 1995.

HH. All prior paragraphs are adopted by reference in their entirety.

II. This claim is essentially the same claim as Third Claim, except it is for interest rather than penalties. Since the IRS failed to use the "least restrictive means" to effect its "compelling government interest" in collecting taxes, it violated the Brownes' rights under RFRA. The failure to abate interest in the case of religious hardship should be declared unconstitutional and the interest should be abated.

Relief

Wherefore the Plaintiffs request:

That the Court should declare that the treatment of the Brownes by failing to abate the penalties and interest in the case of religious hardship violated the Brownes' rights under the Constitution, RFRA and the IRS Regulations.

That the Court should order the abatement of the penalties and interest applied to the Brownes' tax years 1993, 1994 and 1995.

That the Court should order the Internal Revenue Service to alter its practices to comport with the Constitution, RFRA and their own regulations and provide equal access to

the system of exemptions for persons whose hardship stems from religious faith.

That the Court provide such other and further relief as may be just and proper.

Plaintiffs demand a trial by jury on all issues so triable.

Dated this _____ day of October, 1997.

J. E. McNeil
James Torrisi
Jordan, McNeil & Ricks, P.C.
P.O. Box 892
4614 Wisconsin Avenue, NW
Derby Line, VT 05830
Washington, D.C. 20016
(202) 686-2600
(802) 873-3934
D.C. Bar No. 293852
Fed. Bar No. 000008365192

Footnotes

fn1 City of Boerne v. P. F. Flores, Archbishop of San Antonio, _____ US_____ _____Law Ed_____No. 95-2074 (June 25, 1997). The Supreme Court found the unconstitutionality of RFRA related to the power of Congress in relation to the states. This complaint is against a federal agency and the Boerne decision, while relevant, does not directly apply.

fn2 Quakers have no ordained ministers nor written doctrine. They believe that each person should seek to know God's will directly as it continues to be revealed. Since this belief is capable of abuse, Friends have developed the system of Committees of Clearness to help discern God's will from individual leadings. A Committee of Clearness is chosen from members of the Religious Society of Friends who are respected for their piety and wisdom. The Committee of Clearness meets and prays with the individuals who are asking for guidance. Practical problems are raised, as well as many questions as to motive. Only after careful listening to God, does a Committee of Clearness indicate its approval or lack of approval of a course of action.

fn3This same language was favorably cited in Boerne as well at _____

Gordon and Edith Browne
RR#1 Box 32-B
Barnet, VT 05021

11-IV-94

Internal Revenue Service
Andover, MA 05501

To whom it may concern:

Our annual struggle of conscience is at hand. We accept the right ond the need for uur government to tax us in order to carry on the legitimate of the state in the service of the people. Therefore, we faithfully prepare as complete and honest a tax return as we can and set aside money to pay all that we may owe. You ore charged with collecting our taxes, and we have no quarrel with that and no wish to impede your assigned work.

However, when we look at Somalia, at Bosnia, at Iraq, at Rwanda, at Burundi, at many other violent places, we know as surely as we know anything in this world that the brutal violence and killings associated with the fighting in such places is not in keeping with God's intentions for human beings. Rather, in the person of Jesus, we see the model for lives lived in reflection of God's love. When we find that of the total revenues of our government are set aside for the cruel and hideous purposes of war, what are we to do? We are Quakers and pacifists, conscientious objectors to all wars. We would not willingly participate in such conflicts. In conscience, we cannot pay for others to do what we are unwilling to do, nor can we pay to divert the bounty of God's

creation to preparation for destroying part or all of that creation.

Once again, therefore, we send you our completed return with a check for 72% of what the return shows we owe. We will also pay the other 28% but not to you We will send it to life-affirming and life—supporting organizations. We long for the day when legislation will provide for such conscientious objection to the payment of taxes for military purposes. Until then, however, we shall have to use this awkward, alternative method of paying our taxes. We regret any difficulty it causes you.

Cordially yours,

Gordon Browne, Jr.
Edith C. Browne

Gordon and Edith Browne
RR#1, Box 32-B
Barnet, VT 05021

14- IV-95
Internal Revenue Service
Andover, MA 05501

To whom it may concern:

Enclosed is our Form 1040 for 1994 and an accompanying payment of $13 As in past years, we have hod prepared a complete, detailed, and accurate tax return We accept and approve the right of government to tax its citizens for the public good.

Also, as in past years, we have withheld the amount of our tax that would be used for military purposes and are sending that amount to life— Supporting and life-affirming agencies. We are Quakers and pacifists and cannot suoport the use of human and natural resources, created by God, for the destruction of ports of God*s creation in the blasphemy which is modern war. We would riot allow our bodies to be conscripted for such immorality. We cannot allow our financial resources to be conscripted for such purposes either. In 1994, 27.7% of tax dollars was used for military purposes. We are sending $713., which is that same percentage of our tax still owed, to other agencies than IRS to fulfill both our civic and religious duties.

We are sorry if our way of paying our taxes proves inconvenient for you, but we see no other way to honor our scruples until new legislation allows for such conscientious

objection as we feel to the practice of war and to preparation for it.

cc. J. E. McNeil

Cordially,

Gordon Browne, Jr.
Edith C. Browne

Gordon ond Edith Browne
RR#1 Box 32-B
Borriet, VT 05021

11-IV-94

Internal Revenue Service
Andover, MA 05501

To whom it may concern:

Enclosed is our Form 1040, as accurately and completely filled out as we can have it done for us. Once again, as has been true for many years, we are faced with a painful moral dilemma by our tax. We accept and support the right of government to tax its citizens for the general good, even when some of our taxes are used for purposes which seem to us of dubious value. We cannot, however, contribute with our taxes any more than we can with our bodies to the qross evil and immoral destruction which ore modern war. We are Quakers and pacifists, and our most deeply held reliqious convictions prohibit our participation, directly or indirectly, in war. We are meant to be stewards of God's creation and creatures, not their destroyers. While our government recognizes such religious scruples with provision for conscientious objection to military service, it asks us to pay to have others do what we cannot in conscience do ourselves. In this dilemma, we must do what we have done in oast years. we are sending you all the tax we owe except the percent——which we understand this year is 25.3%--that would go for current military expenses. Enclosed is our check for $486. The balance of $165. we are sending to non governmental, life-sustaining and life-supporting organizations.

We regret any inconvenience to IRS, who, we know, has no role in determining how taxes are spent. We look forward to the day when we may pay our full tax to you, with the right to assign it to governmental services other than the military Lintil c:onqress makes that possible, we feel we have no other choice than to do what we do now.

Cordially,

Gordon Browne, Jr.
Edith C. Browne

cc. Senators Jeffords and Leahy
Congressman Sanders
JE.McNeil

No. 99-632

In the Supreme Court of the United States

GORDON M. BROWNE AND EDITH C. BROWNE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

LORETTA C. ARGRETT
Assistant Attorney General

GILBERT S. ROTHENBERG
MICHELLE B. O'CONNOR
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the imposition of federal income taxes, penalties and interest on petitioners violates the Free Exercise Clause of the First Amendment to the United States Constitution or the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Adams v. *Commissioner*, 110 T.C. 137 (1998), aff'd, 170 F.3d 173 (3d Cir. 1999)	4, 10, 11
Autenrieth v. *Cullen*, 418 F.2d 586 (9th Cir. 1969), cert. denied, 397 U.S. 1036 (1970)	11
Babcock v. *Commissioner*, 51 T.C.M. (CCH) 931 (1986)	11
Bowen v. *Roy*, 476 U.S. 693 (1986)	7
Branch Ministries, Inc. v. *Rossotti*, 40 F. Supp. 2d 15 (D.D.C. 1999)	11
California v. *Grance Brethren Church*, 457 U.S. 393 (1982)	3
Carlson, In re, 126 F.3d 915 (7th Cir. 1997), cert. denied, 118 S. Ct. 1388 (1998)	5
Cheema v. *Thompson*, 67 F.3d 883 (9th Cir. 1995)	12
City of Boerne v. *Flores*, 521 U.S. 507 (1997)	9
Craddick v. *Duckworth*, 113 F.3d 83 (7th Cir. 1997)	12
Droz v. *Commissioner*, 48 F.3d 1120 (9th Cir. 1995), cert. denied, 516 U.S. 1042 (1996)	10
EEOC v. *Catholic University*, 83 F.3d 455 (D.C. Cir. 1996)	10
Employment Division v. *Smith*, 494 U.S. 872 (1990)	7, 8, 9
Estate of Geraci v. *Commissioner*, 502 F.2d 1148 (6th Cir. 1974), cert. denied, 420 U.S. 992 (1975)	5

Cases—Continued: Page

Gates Community Chapel of Rochester, In re, 212 B.R. 220 (Bankr. W.D.N.Y. 1997) 10
Hernandez v. *Commissioner*, 490 U.S. 680 (1989) 10, 11
Horowitz v. *Commissioner*, 69 T.C.M. (CCH) 2558 (1995), aff'd, 139 F.3d 889 (4th Cir. 1998) 6
Lefcourt v. *United States*, 125 F.3d 79 (2d Cir. 1997), cert. denied, 118 S. Ct. 2341 (1998) 7
Lull v. *Commissioner*, 602 F.2d 1166 (4th Cir. 1979), cert. denied, 444 U.S. 1014 (1980) 11
McIntyre v. *Commissioner*, 272 F.2d 188 (6th Cir. 1959) 5-6
McMahan v. *Commissioner*, 114 F.3d 366 (2d Cir. 1997) 6, 7
Packard v. *United States*, 7 F. Supp. 2d 143 (D. Conn. 1998) aff'd, 99-2 U.S. Tax Rep. (RIA) ¶ 50,630 (2d Cir. 1999) 10
Sherbert v. *Verner*, 374 U.S. 398 (1963) 7
Small v. *Lehman*, 98 F.3d 762 (3d Cir. 1996) 12
Steckler v. *United States*, 98-1 U.S. Tax Rep. (RIA) ¶ 50,219 (E.D. La. 1998) 10
United States v. *Boyle*, 469 U.S. 241 (1985) 5, 7
United States v. *Haworth*, 386 F. Supp. 1099 (S.D.N.Y. 1974) 11
United States v. *Lee*, 455 U.S. 252 (1982) 4, 10, 12
United States v. *Nelson*, 796 F.2d 164 (6th Cir. 1986) 11
Webster v. *United States*, 375 F.2d 814 (Ct. Cl. 1967) 5
Young, In re, 141 F.3d 854 (8th Cir. 1997), cert. denied, 119 S. Ct. 43 (1998) 9-10

Constitution, statutes and regulation:

U.S. Const.:
Amend. I (Free Exercise Clause) 4, 7, 8, 9, 11
Amend. XIV 9
§ 5 9

Statutes and regulation—Continued:	Page
Internal Revenue Code (26 U.S.C.):	
§ 1341	3
§ 3406(a)(1)	
§ 6404(e)	3
§ 6404(i)	5
§ 6551 (1994 & Supp. III 1997)	2
§ 6651(a)	5
§ 6651(a)(2)	5
§ 6651(b)(2)	5
§ 6654 (1994 & Supp. III 1997)	2
§ 6654(a)	5
§ 6654(e)(3)(A)	5
§ 7421	3
Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (42 U.S.C. 2000bb-2000bb-4)	3
42 U.S.C. 2000bb-1	8
42 U.S.C. 2000bb-1(a)	9
28 U.S.C. 2201	3
Treas. Reg. § 301.6651-1(c)(1) (26 C.F.R.)	6
Miscellaneous:	
H.R. Rep. No. 88, 103d Cong., 1st Sess. (1993)	9, 10
S. Rep. No. 111, 103d Cong., 1st Sess. (1993)	10

In the Supreme Court of the United States

No. 99-632

GORDON M. BROWNE AND EDITH C. BROWNE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is reported at 176 F.3d 25. The opinion of the district court (Pet. App. 4-12) is reported at 22 F. Supp.2d 309.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1999. The petition for rehearing was denied on July 12, 1999 (Pet. App. 15a). The petition for a writ of certiorari was timely filed on Tuesday, October 12, 1999 (following a federal holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are members of the Religious Society of Friends, commonly known as the Quakers, who sincerely believe that participation in war is contrary to God's will (Pet. App. 97a-98a). Petitioners also believe that a "voluntary" payment of taxes—one made without the compulsion of a levy or court order—is against the will of God to the extent that such taxes are used to fund participation in war by others (*id.* at 98a). Although petitioners timely filed joint federal income tax returns for the years 1993, 1994, and 1995, they paid only approximately 72% of the taxes shown due on those returns (*id.* at 98a-100a, 110a-115a). They did not pay the remaining amount, which they calculated to represent the portion of their taxes that would be used by the government to fund the military (*ibid*). Petitioners attached a letter to their returns which explained their reason for not paying their taxes in full and which stated that the portion of their taxes not paid to the United States would be sent instead to "non-governmental life-sustaining and life supporting organizations" (*ibid*).

2. The United States collected petitioners' unpaid taxes for each of these years by levying on their accounts (Pet. App. 6a, 99a-100a). The government also collected interest on the unpaid taxes and statutory additions to tax for failure to timely pay taxes (26 U.S.C. 6651) (1994 & Supp. III 1997) and for underpayment of estimated taxes (26 U.S.C. 6654) (1994 & Supp. III 1997). After petitioners' claim for refund of the interest and additions to tax was denied, petitioners

commenced this refund suit in federal district court (Pet. App. 6a, 96a, 99a-104a).[1]

Petitioners did not dispute their liability for the taxes collected by the government. They contended, however, that the government's refusal to grant them an exemption from interest and additions to tax constituted an impermissible discrimination against their religious beliefs under the Free Exercise Clause of the First Amendment (Pet. App. 103a-104a). Petitioners further asserted that a requirement that they voluntarily pay their taxes or be liable for interest and penalties for a failure to do so violated the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.* Petitioners claimed that a less intrusive means of furthering the government's compelling interest in collecting taxes would be to levy upon their assets immediately upon assessment of the taxes and thereby minimize the accrual of interest and penalties on unpaid taxes (Pet. App. 105a-106a).[2]

---

[1] Because the Tax Court has exclusive jurisdiction over claims for abatement of interest (see 26 U.S.C. 6404(i)), the district court lacked jurisdiction over that claim in this case. The court of appeals did not rule on that jurisdictional issue, however, electing instead to affirm the judgment of the district court on the ground that petitioners' complaint failed to state a claim upon which relief could be granted (Pet. App. 2a-3a).

[2] Petitioners sought a declaratory judgment and an injunction requiring the Internal Revenue Service "to alter its practices to comport with the Constitution, RFRA and their own regulations and provide equal access to the system of exemptions for persons whose hardship stems from religious faith" (Pet. App. 106a). The district court lacked jurisdiction over these claims for declaratory and injunctive relief. See 26 U.S.C. 7421; 28 U.S.C. 2201; *California* v. *Grace Brethren Church*, 457 U.S. 393, 408 (1982). Neither the district court nor the court of appeals addressed these jurisdictional issues (Pet. App. 2a-3a).

3. The district court granted judgment on the pleadings to the United States (Pet. App. 4-12). The court rejected petitioners' First Amendment claims, noting that "courts consistently have upheld the constitutionality of the federal tax laws when considering objections similar to those raised by [petitioners]" (*id.* at 7). The court also held that petitioners were not entitled to relief under RFRA, for "the Supreme Court has established that uniform, mandatory participation in the Federal income tax system, irrespective of religious belief, is a compelling governmental interest" (*id.* at 11, quoting *Adams* v. *Commissioner*, 110 T.C. 137, 139 (1998), aff'd, 170 F.3d 173 (3d Cir. 1999)). The court rejected petitioners' suggestion that the government could realize its compelling interest through a means less burdensome on their religious rights for, as this Court has held, "[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious beliefs" (Pet. App. 7, quoting *United States* v. *Lee*, 455 U.S. 252, 260 (1982)).

4. The court of appeals affirmed (Pet. App. 1-3). The court held that the Free Exercise Clause does not afford petitioners a basis for refusing to comply with the tax laws and does not entitle them "to force the IRS to levy the taxes due at additional time and expense" (*id.* at 2-3). The court also rejected petitioners' claim under RFRA, holding that "voluntary compliance is the least restrictive means by which the IRS furthers the compelling governmental interest in uniform, mandatory participation in the federal income tax system" (*id.* at 3, quoting *Adams* v. *Commissioner*, 170 F.3d 173, 176 (3d Cir. 1999)).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. Under Section 6651(a) of the Internal Revenue Code, if a taxpayer fails to pay his tax by the due date, a statutory penalty "shall be added to the amount shown as tax on such return" "unless it is shown that such failure is due to reasonable cause and not due to willful neglect." 26 U.S.C. 6651(a)(2); see also 26 U.S.C. 6651(b)(2). This penalty is mandatory and must be imposed unless the taxpayer demonstrates a reasonable cause for failing timely to pay his taxes and the absence of any willful neglect of his obligations. See, *e.g.*, *United States* v. *Boyle*, 469 U.S. 241, 245-246 (1985); *In re Carlson*, 126 F.3d 915, 921 (7th Cir. 1997), cert. denied, 118 S. Ct. 1388 (1998); *Estate of Geraci* v. *Commissioner*, 502 F.2d 1148, 1149-1150 (6th Cir. 1974), cert. denied, 420 U.S. 992 (1975).

Under Section 6654(a) of the Code, a statutory penalty is added to the tax if there is an underpayment or nonpayment of estimated taxes when due. 26 U.S.C. 6654(a). Section 6654(e)(3)(A) specifies that this penalty shall not apply if "the Secretary determines that by reason of casualty, disaster, or other unusual circumstances the imposition of such addition to tax would be against equity and good conscience." 26 U.S.C. 6654(e)(3)(A). Although there is no explicit "reasonable-cause" exception to this penalty, some courts have held that a showing of reasonable cause and a lack of willful neglect is sufficient to warrant abatement of a penalty under this Section. See *Webster* v. *United States*, 375 F.2d 814, 822 (Ct. Cl. 1967); *McIntyre* v.

Commissioner, 272 F.2d 188, 189 (6th Cir. 1959). In the absence of a showing of reasonable cause or some higher level of excuse, imposition of this penalty is mandatory. *Horowitz* v. *Commissioner*, 69 T.C.M. (CCH) 2558, 2561 (1995), aff'd, 139 F.3d 889 (4th Cir. 1998).

Under the applicable Treasury regulations, a "failure to pay [taxes] will be considered to be due to reasonable cause to the extent that the taxpayer has made a satisfactory showing that he exercised ordinary business care and prudence in providing for payment of his tax liability and was nevertheless either *unable to pay the tax* or would suffer an undue hardship * * * if he paid on the due date." 26 C.F.R. § 301.6651-1(c)(1) (emphasis added). Circumstances that constitute reasonable cause "[g]enerally * * * arise as a result of factors beyond a taxpayer's power to control." *McMahan* v. *Commissioner*, 114 F.3d 366, 369 (2d Cir. 1997).

b. Petitioners failed to establish reasonable cause for their failure to timely pay their taxes and estimated taxes for the years at issue. Their complaint did not allege that they exercised ordinary business care, that they were unable to pay the taxes, or that undue financial hardship would result from timely paying the taxes in question. Instead, the allegations in the complaint demonstrated that petitioners' failure timely to pay their taxes was due to their determination that "[t]heir religious beliefs compelled them to withhold the portion of their tax moneys equivalent to the money the government was allocating to the Department of Defense" (Pet. App. 98a). Petitioners admitted that they were financially able to pay their taxes—instead of paying the taxes due, they elected to pay the same amount to organizations that, in their view, were "bene-

ficent" (*id.* at 98a-99a). A decision not to pay taxes that is based on a religious or other belief is not "[a] factor[] beyond the taxpayer's power to control" that constitutes a "reasonable cause" that excuses the imposition of tax penalties. *McMahan* v. *Commissioner*, 114 F.3d at 369.

Even apart from the absence of "reasonable cause" for their failure to pay, petitioners were ineligible for a waiver of penalties because their "conscious, intentional failure" (*United States* v. *Boyle*, 469 U.S. at 245) to comply with the tax laws constituted a willful neglect of their statutory obligations. See *Lefcourt* v. *United States*, 125 F.3d 79, 84 (2d Cir. 1997), cert. denied, 118 S. Ct. 2341 (1998).

c. Petitioners err in contending that, because the Treasury Department has granted waivers of penalties for circumstances such as "destruction of a taxpayer's residence by fire or civil disturbance, serious illness, or unavoidable absence," the agency may not refuse to extend a waiver for "religious hardship" without a compelling reason (Pet. 11-13). Petitioners incorrectly rely on this Court's decision in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), as support for their contention. That decision in fact makes clear that the Free Exercise Clause does *not* require the United States to grant an exemption for religious hardship when, as here, waivers are granted on the basis of facially neutral, uniformly applicable standards that do not take into account religious or other beliefs. *Id.* at 883-884; see also *Sherbert* v. *Verner*, 374 U.S. 398, 401-403 (1963); *Bowen* v. *Roy*, 476 U.S. 693, 699-701 (1986). Unlike the unemployment compensation cases (such as *Bowen* and *Sherbert*) which involved a governmental determination of the employee's subjective motivation for declining to work, the Internal Revenue Service is

not permitted to inquire into an individual's subjective motivation for failing to pay taxes. Waiver of tax penalties is permitted only upon the occurrence of specific circumstances beyond the individual's control that render him unable to pay his taxes. See page 5, *supra*. This facially neutral standard does not discriminate among taxpayers based upon their religious or nonreligious beliefs. Moreover, statutes that contain only a few, isolated, and extraordinary exceptions to a general rule are not subject to the reasoning of decisions such as *Bowen* and *Sherbert*, which applies only to statutory schemes that, either on their face or in application, significantly and consistently turn upon individualized, case-by-case decisionmaking. The recognition in the Internal Revenue Code of a small number of exceptions to penalties for circumstances wholly beyond the control of the taxpayer does not open the door to across-the-board individualized decisionmaking that factors in circumstances entirely within the control and election of the taxpayer.

2. a. The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, creates a statutory right of free exercise that employs the "compelling interest" test applied in cases arising under the Free Exercise Clause prior to this Court's decision in *Employment Division* v. *Smith*, 494 U.S. 872 (1990). Under this statute, when a governmental action substantially burdens a religious belief, the government must demonstrate that the challenged action (i) furthers a compelling governmental interest and (ii) represents the least restrictive means of furthering that interest. 42 U.S.C. 2000bb-1.

In *Smith*, the Court held that the Free Exercise Clause permitted a State to deny unemployment benefits to persons dismissed from their jobs based on the

religious use of peyote, a drug whose use was generally prohibited under the State's criminal laws. The Court held that the generally applicable, facially neutral criminal law banning the use of peyote did not implicate the Free Exercise Clause. In so holding, the Court rejected the argument that the Free Exercise Clause required the State to demonstrate a compelling interest for denying an exemption for the religious use of peyote. The Court held that the compelling interest test was inapplicable to "an across-the-board prohibition on a particular form of conduct." 494 U.S. at 884.

RFRA makes the compelling interest test enunciated under pre-*Smith* precedent applicable to all governmental action that imposes a "substantial burden" on the free exercise of religion. 42 U.S.C. 2000bb-1(a). The legislative history of the Act explains that courts "should look to free exercise of religion cases decided prior to *Smith* for guidance in determining whether or not religious exercise has been burdened and the least restrictive means has been employed in furthering a compelling governmental interest." H.R. Rep. No. 88, 103rd Cong., 1st Sess. 6-7 (1993). In adopting this standard, Congress did not intend to "approve[] nor disapprove[] of the result in any particular court decision involving the free exercise of religion." *Ibid.* Instead, Congress sought only to restore "the legal standard that was applied in" pre-*Smith* decisions. *Ibid.* Accord, S. Rep. No. 111, 103rd Cong., 1st Sess. 9 (1993).[3]

---

[3] In *City of Boerne* v. *Flores*, 521 U.S. 507, 512, 522 (1997), the Court held that Congress lacked authority under Section 5 of the Fourteenth Amendment to impose RFRA upon state and local governments. The United States conceded in the courts below that RFRA remains applicable to the federal government after *Flores*. See *In re Young*, 141 F.3d 854 (8th Cir. 1997) (upholding

b. It was well settled under the cases that preceded *Smith* that neutral, generally applicable tax laws satisfy the compelling interest test. See, *e.g.*, *Hernandez* v. *Commissioner*, 490 U.S. 680 (1989); *United States* v. *Lee*, 455 U.S. 252, 257-258 (1982); H.R. Rep. No. 88, *supra*, at 5 n.13. The courts of appeals have consistently reached that same conclusion under RFRA. See *Adams* v. Commissioner, 130 F.3d 173 (3d Cir. 1999); Droz v. *Commissioner*, 48 F.3d 1120, 1122-1123 (9th Cir. 1995), cert. denied, 516 U.S. 1042 (1996); *Packard* v. *United States*, 7 F. Supp.2d 143, 147 (D. Conn. 1998), aff'd, 99-2 U.S. Tax Rep. (RIA) ¶ 50,630 (2d Cir. 999) (voluntary compliance with tax laws represents least restrictive means of furthering compelling governmental interest). Accord, *Steckler* v. *United States*, 98-1 U.S. Tax Rep. (RIA) ¶ 50,219 (E.D. La. 1998)). As this Court emphasized in *United States* v. *Lee*, 455 U.S. at 260, compliance by all taxpayers with the tax laws is the *only* means—and thus necessarily the least restrictive means—of furthering the government's compelling interest:

> The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief. * * * Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with

---

the constitutionality of RFRA as applied to the federal government), cert. denied, 119 S. Ct. 43 (1998); *EEOC* v. *Catholic University*, 83 F.3d 455 (D.C. Cir. 1996) (applying RFRA to the federal government prior to *Flores*). But see *In re Gates Community Chapel of Rochester, Inc.*, 212 B.R. 220, 225-226 (Bankr. W.D.N.Y. 1997) (interpreting *Flores* as holding that RFRA is unconstitutional as to both state and federal governments).

> the payment of taxes affords no basis for resisting the tax.

Ibid. See also *Hernandez* v. *Commissioner*, 490 U.S. at 700.

c. It was also well settled under pre-*Smith* precedent that the Free Exercise Clause does not bar the imposition of penalties on taxpayers who fail to comply with the tax laws based on religious objections. Penalties further the compelling interest in protecting the integrity of the tax system by compensating the government for the lost use of revenues and by providing an incentive for taxpayers to comply. *United States* v. *Nelson*, 796 F.2d 164, 168 (6th Cir. 1986) (penalties are "part of the total tax system and exist[] to protect the administration of the system"); *Autenrieth* v. *Cullen*, 418 F.2d 586, 588-589 (9th Cir. 1969), cert. denied, 397 U.S. 1036 (1970). Courts have therefore consistently upheld the imposition of civil penalties on taxpayers who refuse to comply with the Internal Revenue Code based upon their religious objections. See, *e.g.*, *Adams* v. *Commissioner*, 170 F.3d 173 (3d Cir. 1999); *Lull* v. *Commissioner*, 602 F.2d 1166 (4th Cir. 1979), cert. denied, 444 U.S. 1014 (1980); *Babcock* v. *Commissioner*, 51 T.C.M. (CCH) 931 (1986); *United States* v. *Haworth*, 386 F. Supp. 1099 (S.D.N.Y. 1974).

Petitioners err in contending (Pet. 14-17) that the decision in this case creates a conflict with the holdings of other courts of appeals. As the above-cited cases reflect, every court that has considered the application of RFRA to the federal income tax laws has concluded that voluntary compliance with the tax laws is the least restrictive means of furthering the government's compelling interest in collecting taxes. See also *Branch Ministries, Inc.* v. *Rossotti*, 40 F. Supp.2d 15 (D.D.C.

1999). As this Court has long emphasized, "the tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." *United States* v. *Lee*, 455 U.S. at 260.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
LORETTA C. ARGRETT
Assistant Attorney General
GILBERT S. ROTHENBERG
MICHELLE B. O'CONNOR
Attorneys

DECEMBER 1999

---

[4] The cases that petitioners cite for the general proposition that the government should seek alternatives that impose less burdensome restrictions on religious freedom (Pet. 14-15) do not involve federal taxes. They instead involve wholly unrelated statutory schemes and create no conflict with the decision of the court of appeals in this case. See, *e.g.*, *Craddick* v. *Duckworth*, 113 F.3d 83 (7th Cir. 1997) (State required to demonstrate that regulation permitting limited wearing of medicine bag by prisoner was least restrictive means of furthering its interest in security); *Small v. Lehman*, 98 F.3d 762 (3d Cir. 1996) (district court erred in applying summary judgment standard in determining whether prisoners' free-exercise rights were substantially burdened by State's refusal to provide separate worship facilities); *Cheema* v. *Thompson*, 67 F.3d 883 (9th Cir. 1995) (State required to demonstrate that prohibiting student from wearing ceremonial knife to school was least restrictive means of furthering State's interest in safety).

(3)

No.99-632

FILED
DEC 13 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the

Supreme Court of the United States

GORDON M. BROWNE and EDITH C. BROWNE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY TO OPPOSITION

Barnaby W. Zall
7018 Tilden Lane
Rockville, MD 20852
(301) 231-6943

J. E. McNEIL
Counsel of Record
4614 Wisconsin Avenue, NW
Washington, DC 20016
(202) 686-2600

6pp

ADDITIONAL REASONS TO GRANT THE WRIT

In its opposition, the United States ignores the fact that there is only one issue presented in this case: whether the Internal Revenue Service may deny access to already-existing individualized hardship waiver procedures for, and impose additional penalties on, those whose hardship is religious in nature.[1]

There is no jurisdictional issue in this case (which was decided on the pleadings).[2] There is no factual question

---

[1]For example, the government changes the Issue Presented to read: "[w]hether the imposition of federal income taxes . . . on petitioners . . ." Opposition ("Opp.") at 1. That has never been an issue raised in the pleadings below.

[2]The Opposition raises the same erroneous jurisdictional argument that the Department of Justice attorney listed on the Opposition raised in the courts below and was summarily dismissed as unfounded. Opp. at 3 n. 1, n. 2. The lower courts would not have any authority to "elect" a judgment on the pleadings over a dismissal for lack of jurisdiction. *Steel Co, v, Citizens for a Better Environment,* 523 U.S. 83 (1998). The court of appeals examination of the district court's jurisdiction is mandatory. *Bender v. Williamsport Area School,* 475 U.S. 534, 541 (1980). Under IRC § 6213, the US Tax Court has no jurisdiction over interest unless there is a deficiency assessment by the IRS. The Brownes, by filing accurate returns, are "self-assessed" and therefore there is no deficiency assessment. Jurisdiction by the Tax Court could not be triggered. Since the Tax Court could not have

in this case (for the same reason). The case does NOT deal with "the imposition of federal income taxes," Opp. at 1, but only with the IRS's procedural failures.

1. The decision below conflicts with decisions of this Court and other courts of appeals.

The government asserts that the decision below "does not conflict with any decision of this Court or any other court of appeals." Opp. at 5. In fact, Petitioners demonstrated several conflicts, including *Cheema v. Thompson*, 67 F.3d 883, 885 (9th Cir. 1995)(RFRA requires serious consideration and a demonstration of least restrictive means); *Craddick v. Duckworth*, 113 F.3d 83, 85 (7th Cir. 1997); *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3rd Cir.), *cert. denied*, __U.S.__, 120 S.Ct. 56 (1999).

The decision below conflicts with these decisions because each of these cases required an inquiry to determine the burden on the plaintiffs, the Government's compelling interest AND whether the Government used the least restrictive means to meet its compelling interest. This inquiry demands proof, not merely lawyers' assertions. In this case, which was decided on the pleadings, the burden on the Brownes was conceded, but an inquiry is still required to determine the Government's compelling interest in the waiver system and whether it used the least restrictive means.

The decision below also conflicts with *Employment Division v. Smith*, 494 U. S. 872 (1990), in which this Court

---

jurisdiction, the Brownes would never be able to have their day in Court if the U.S. District Court and the U.S. Court of Appeals did not take jurisdiction over the constitutional claim concerning waiver of the interest.

reiterated that access to individualized hardship waivers to otherwise encompassing rules could not be denied on religious grounds. [3]

Nowhere in the Opposition does the government show a non-conflicting case which dealt with denial of access to an individualized hardship waiver procedure on religious grounds.

Nowhere does the government show a case based on the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq*., saying that the government may deny access to an individualized hardship waiver procedure on religious grounds.

Finally, the government never deals with the second part of the issue presented in the Petition: that the current IRS procedure penalizes those who claim religious hardship more harshly than necessary.

The fact that the conflicting cases are not tax cases does not make the conflict any less real. Virtually all the cases cited by the Government, such as *Lee*, relied directly on the First Amendment to provide relief. Those cases do not "conflict" because they did not explore the issue of discrimination in the application of a general hardship waiver. The only non-conflicting cases which do rely on the non-discriminatory application of the general hardship

---

[3] The Government once again cites this Court's *dicta* in *United States v. Lee,* 455 U.S. 252 (1982), concerning the Government's compelling interest in the income tax system as being dispositive of any tax claims. *Lee* dealt exclusively with Social Security which is not part of the federal income tax system. The Government ignores some cases which deal with the compelling interest of security in prisons and schools--just as compelling but still not dispositive.

waiver are *Adams v. Commissioner*, 110 T.C. 137 (1998), *aff'd*, 170 F.3d 173 (3d Cir. 1999) [Cert. Petition No.99-798.], and *Packard v. United States,* 7 F.Supp.2d 143 (D.Conn. 1998) *aff'd*, 99-02 U.S. Tax Rep. (RIA) ¶ 50,630, (2d Cir. 1999), which are also seeking review by this Court. But none of these cases are the ones on which the Brownes' claims rest.

2. **The standard to grant waivers of penalties and interest is facially discriminatory and subjective.**

The Government argues that this case is distinguishable from *Smith* because the waivers in the statute and regulation are granted on the basis of "facially neutral uniformly applicable standards that do not take into account religious or other beliefs." Opp. 7. Yet, in *Smith,* the Court explicitly reiterated that the standard in *Bowen v. Roy,* 476 U.S. 693(1986)(plurality), and *Sherbert v. Verner*, 374 U.S. 398 (1963), was to be read that where a Government "has in place a system of individual exemptions," such as the hardship system in place here, "it may not refuse to extend that system to cases of 'religious hardship' without a compelling reason." 494 U.S. at 884. The system at issue in this case is not the federal income tax system, but the system of waivers for penalties and interest. This waiver system cannot be facially neutral when the plain language of the agency rule which, according to the introduction onf the IRM, applies to all waivers states: "[a]n appeal should not be based on moral, political, constitutional, religious or similar arguments." IRM [120.1] 6.1.3.

The Government again ignores the plain language of both the statute and the Internal Revenue Manual. The penalties and interest shall be levied UNLESS the taxpayer is "unable to pay the taxes or *would suffer an undue hardship*... if he paid on the due date" 26 CFR. § 301.6651-

1(c)(1) (emphasis added). Instead the Government has added the word "financial." Opp. at 6 ("Their complaint did not allege...that undue *financial* hardship would result...") (emphasis added). This addition of the word "financial" is incorrect under the Government's own regulations which permit waivers, for example, because of illness or absence from the country. Opp. at 7. This is an important issue on which the lower courts need guidance.

Conclusion

For the reasons stated above and in the Petition itself the Court should grant the petition for a writ of certiorari.

Respectfully submitted,
J. E. McNeil
Counsel of Record
4614 Wisconsin Avenue, NW
Washington, DC 20016
(202) 686-2600

Barnaby W. Zall
7018 Tilden Lane
Rockville, MD 20852
(301) 231-6943
December 13, 1999